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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

1. in the 1st. Sess.

SURROGATES' COURTS

OF THE

STATE OF NEW YORK.

BY

THEODORE F. C. DEMAREST.

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ARGUED AND DETERMINED
IN THE
SURROGATES' COURTS
OF THE
STATE OF NEW YORK.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—September, 1886.

SHUTE v. SHUTE.

*In the matter of the judicial settlement of the account
of PETER SHUTE, as administrator of the estate of
GILBERT SHUTE, deceased.*

The costs included in a judgment recovered against an executor or administrator, upon a demand against the decedent, are not a preferred claim against the estate ; but the judgment must be dealt with in its entirety, and the creditor, in case of a deficiency of assets, receive a just proportion, estimated upon the whole amount for which the same was rendered.

An executor or administrator will not be allowed credit, upon his accounting, for money paid to satisfy a claim against decedent, which was barred by the statute of limitations at the time of the latter's death. The first sentence of Code Civ. Pro., § 2793, subd. 5,—which provides that "out of the remainder of the money" arising from a sale, etc., of a decedent's real property for the payment of debts, etc., "must be paid the sum, if any, which has been found to be due to the executor or ad-

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ministrator upon a judicial settlement of his account, after applying thereupon the proceeds of the personal property,"—authorizes the payment, out of the money so realized, of a sum so found due, although it represents the costs and charges incurred and paid to claimant's attorney during the progress of the administration.

Smith v. Meakim, 2 *Dem.*, 129, on this point,—disapproved.

The second sentence of the subdivision above cited, qualifying the effect of the portion quoted, is inoperative, since no sum could be "found to be due" to an executor or administrator, upon a judicial settlement of his account, except a balance of expenses of administration which the assets were insufficient to pay.

PENDING a proceeding to sell the real estate of decedent for the payment of his debts, the administrator instituted this proceeding for the settlement of his account. Among other things, Joseph Brush and another, as executors of the will of Israel Peck deceased, presented a claim for the amount of a judgment recovered by them, for a debt of decedent, against the administrator, for about \$2,400; in which were included costs of the action, amounting to about \$200. The administrator, in his account, credited himself with \$100, being the amount of a promissory note for that sum given by the intestate to Mary Shute, bearing date May 20th, 1876.

HERMAN H. SHOOK, *for administrator.*

WALTER S. ALLERTON, *for Sarah Shute and others, next of kin.*

GEO. W. HUNT, *for James H. Shute, next of kin.*

CLOSE & ROBERTSON, *for Joseph Brush and another, creditors.*

THE SURROGATE.—The counsel for the judgment creditors, in the case of Brush and another against the administrator, insist that the costs in that action are a preferred claim and should be paid before any other. This is a matter of moment, in case it should prove

that there are not sufficient assets to pay all claims in full. Costs were first given where a man recovered damages, *de incremento*, in actions of assumpsit, etc. That is to say, the costs were added to the amount recovered, as an increase, and thus became a part of the judgment debt. This is so still. Hence, in this case, the judgment creditor presents here the whole amount of his judgment, as a claim against the deceased as increased by the addition of the costs. The claim cannot be divided, but must be dealt with in its entirety. The lien for costs, given by statute, to an attorney, is not upon the costs, as such, embraced in the judgment, but upon the client's cause of action or counterclaim. If the judgment creditors had, in this case, applied to the court for leave to issue execution, they would have set forth, as the basis of their claim, the whole amount of the judgment including costs; and if, on an accounting, it had appeared that the assets were insufficient to pay all the debts, the execution would have been issued for the *pro rata* share, applicable to the judgment as a whole. No distinction could be made as between the amount of the verdict and the costs. It follows that none can be made here, but that the judgment creditors must have applied upon their judgment a proportional share with the other creditors, with no preference as to any part thereof.

The administrator credits himself with the sum of \$100 for money paid to Mary Shute in satisfaction of a promissory note given to her by the intestate, for that amount, dated May 20th, 1876, payable on demand. The intestate died April 21st, 1883. The note was, therefore, barred by the statute of limitations at

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the time of the intestate's death, in the absence of any proof to the contrary. The administrator testified that, on one occasion, he heard the deceased say he ought to charge Mary, who lived with him, for board, but as there was no proof that he did so charge her, or that the administrator made any claim upon her for any sum on that account, this mere casual remark of the deceased was not sufficient to either keep the statute from running, or to revive the claim, if barred. The administrator paid her the principal of the note only, and there is no evidence that there was any understanding, at the time, that the claim for board was to extinguish the interest, or if there were, there are not facts sufficient to show that the administrator had any power to enter into such an arrangement. He could not thus, or in any way, revive a debt that was already barred in the intestate's lifetime. This item of credit is, therefore, disallowed.

Decree accordingly.

In October, 1886, the following opinion was filed :

THE SURROGATE.—Subsequently to the settlement of the account of the administrator, the matter of the distribution of the proceeds of sale of the real estate of the intestate, for the payment of his debts, came on to be heard. It appeared, on the judicial settlement of the account of the administrator, that there were allowed to him, as credits, certain costs and charges of his attorney, incurred and paid during the progress of the administration, reckoning which, there was

found due to the administrator, on the accounting, about \$74, and excluding them there would have been a balance of assets in his hands. Counsel for the contestants contend that the amount of such costs and charges, to the extent of such balance of \$74, at least, should not be directed to be paid out of the proceeds of such sale, and cite the case of *Smith v. Meakim* (2 *Dem.*, 129), as an authority in support of the objection. I am unable to concur in the opinion delivered by the learned Surrogate in that case, to the effect that subd. 5 of § 2793 of the Code “refers only to such claims or debts of the decedent as would authorize this court to order a sale of the real estate for the payment of the same, and not for the payment of any expenses incurred in the administration of the estate.” While it is true that, under § 2749, a sale of real estate can only be applied for in order to pay the debts of the decedent and his funeral expenses, it does not follow that the proceeds of such sale are to be used only for such purposes; else, how could any part of them be used for the payment to the widow of a sum in gross, or the surplus be paid to the heirs at law, or how could the executor or administrator be reimbursed a sum found due him on an accounting for expenses of administration which he had paid, when, by paying he exceeded the amount of the assets.

Formerly, where the assets were insufficient to pay in full the expenses of administration and the debts, and the executor or administrator incautiously paid some of the debts in full, he was compelled to lose the excess he had paid, over the proportionate share ascertained to be applicable to all of the debts, where

there was no real estate, and in case, after such accounting and the ascertainment of a deficiency to pay debts, the real estate was sold in order to pay them, there was no statutory provision by which he could be refunded the amount of his loss, even where the proceeds of the sale were abundant for that purpose ; nor, in case his accounting showed that the expenses of his administration exceeded the amount of the assets, and the amount of the difference was found to be due to him, was there any method provided, by which he could recover it. But in 1863, by Session Laws, ch. 400, section 36 of title 4, ch. 6, part 2 of the Revised Statutes was amended by adding thereto the first clause of what is now subd. 5 of § 2793 of the Code. That amendment was comprehensive, authorizing the payment of *any sum found due* to the executor or administrator on the accounting. The proper expenses of administration always enter into the account and affect the result. Hence, it seems clear that he is now entitled out of the proceeds of the sale, to be paid the sum found due him upon the accounting, whatever items were taken into consideration in fixing it, even if the account contained no item of a debt or part of a debt paid by him. The conclusion reached is that a provision must be made in the decree for the payment of the \$74, to the administrator.

It may not be out of place to remark that it does not appear, in the report of the case of *Smith v. Meakim*, that there had been any settlement of the account of the administrator, nor is that any longer necessary, before making an application to sell real estate, under the provisions of § 2750 of the Code, but then it should

be done before the proceeds of the sale are distributed, in order that any balance of assets may be first applied to the payment of the debts.

The last clause of subd. 5 of § 2793 would seem to be superfluous. It is based upon the idea that an accounting has been had, in which a balance has been found due the executor or administrator, embracing debts which have been paid in full. As all debts of the fourth class, to which those here considered belong (2 R. S., 87, § 27) stand upon the same footing in regard to priority of payment, the administrator has no right to prefer one to another, and if he pay one in full when the assets, on an accounting, are sufficient to pay one half only, he will necessarily lose the half of the amount so paid. No such debt or any part of it, would enter into the balance found due to him. If he had paid one or more debts in full, when the assets were insufficient to pay all, he could be allowed, on those so paid by him, only such *pro rata* share with the other creditors, as the assets would pay, and the decree would so direct, but would not decree anything to be due to him by reason of such overpayment. The matter is thus disposed of on the accounting, and therefore, the clause seems to be inoperative. It is not apparent, in view of these considerations, that any sum can be found due an administrator or executor, on a final accounting except for the balance of expenses of administration which the assets are insufficient to pay. That contingency is fully provided for by the act of 1863, which appears to be applicable to such a case only. Had the amendment to that act, as embodied in the Code, been made to read: "And

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this subdivision authorizes the repayment, to an executor or administrator, of any sum paid by him to a creditor of the decedent in excess of the *pro rata* share as fixed by such settlement, not exceeding the proportion which that creditor would be entitled to receive upon the distribution of the proceeds of property disposed of as prescribed in this title," it would have been more practical and in accordance with justice. The amount of the assets so misapplied by the executor or administrator could thus be wholly recovered without injury to any one, unless the proceeds of the sale of the real estate were insufficient to pay all in full, and then he would lose only his share of the deficiency.

Assuming that the amendment referred to is ineffectual for the purpose designed, the executor or administrator, before its adoption, had his remedy against the real estate, which is still unimpaired (*Johnson v. Corbett*, 11 *Paige*, 265-277).

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—September, 1886.

DE LAMATER *v.* McCASKIE.

In the matter of the estate of HIRAM H. HAVENS, *deceased.*

In Code Civ. Pro., § 2713, last sentence, requiring a special proceeding for the discovery of a decedent's assets to be dismissed upon the presenta-

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tion of a proper bond, and the payment of costs, if any, awarded to petitioner, "*within such a time as the Surrogate or other officer fixes for that purpose,*" the clause quoted relates solely to the payment of costs, the time for which cannot be fixed except upon presentation of such a bond.

An award of \$50, costs, against an unsuccessful respondent in a contested special proceeding instituted, under Code Civ. Pro., § 2706, *et seq.*, for the discovery of concealed assets, etc.,—*held* a reasonable exercise of the Surrogate's discretion (*id.*, § 2561).

MOTION made by Edward F. McCaskie to modify the decree entered pursuant to the opinion in this matter, reported in 4 *Dem.*, 549, in regard to the transfer of the securities therein mentioned, and by striking out the fifty dollars costs allowed against him in the proceeding. The only ground on which the application was based was, that he had no notice to appear on the 21st day of July, 1886, fixed for the purpose of the hearing.

F. LARKIN, *for the motion.*

W. H. HALDANE, *opposed.*

THE SURROGATE.—Treating the affidavit of McCaskie in this matter as a petition, he states no ground for the application, other than that he had no notice to appear on the 21st day of July. His counsel now admits that he had such notice, and there is on file proof of the due service thereof. If he made default, he offers no excuse therefor, and states no reason why the decree should be modified. There appears, therefore, no sufficient ground for this application. His counsel, however, seeks relief on matters *dehors* the record, and insists that the decree was irregularly entered. Although not essential to the determination of the motion, I will consider it briefly.

The answer having been decided not to be such as is permitted by § 2710 of the Code, either party had a right to give further evidence as provided by § 2711. After the decision referred to, notice was given by the attorney for the executrix to McCaskie, on the 16th day of July, to appear before the Surrogate on the 21st day of the same month, when he had an opportunity to exercise such right. Not appearing pursuant thereto, and having admitted the possession of the property in question, and not offering to give the security permissible under the provisions of § 2713, the decree complained of was entered. I can see nothing irregular in this.

Counsel for McCaskie claims that it was the duty of the Surrogate, before making the decree, to enter an order fixing the time within which the bond should be presented, under the last clause of § 2713. In that respect he is, doubtless, mistaken. The fixing of the time there referred to relates solely to the payment of costs, and that time cannot be fixed except "upon the presentation of such a bond."

On the subject of the allowance of fifty dollars costs in that proceeding against the moving party here, it is plain that the matter was in the discretion of the court, to the extent of seventy dollars. Under the circumstances, it does not seem that he has any just ground of complaint in that respect.

Motion denied.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—October, 1886.

COCKS v. HAVILAND.

In the matter of the estate of JOHN COCKS, deceased.

A petition presented to a Surrogate's court, embodying a general statement of facts, addressed to its equitable consideration, as if it were possessed of ordinary common law powers, must be denied, in view of the rule that the jurisdiction of such tribunal can be exercised only in the cases and manner prescribed by statute (Code Civ. Pro., § 2472).

An allegation that one of two or more co-executors is insolvent, and has no assets in his hands, does not obviate the necessity of making him a party to a special proceeding instituted by a beneficiary of the will, seeking to enforce the payment of money, *e. g.*, arrears of an annuity, due to petitioner thereunder.

IN February, 1882, a decree in regard to this estate was entered, pursuant to the decision reported in 5 *Redf.*, 406. Phebe C. Haviland, an executrix of the will of the deceased, was then found to have certain funds of the estate in her hands, which were directed to be converted and invested by the executors, with a view to producing the annuity of \$777.03, to which Adelia Cocks, the widow of the testator, was entitled by virtue of the provisions of the will, as modified by the action of the parties; and Harrison Cocks, George J. Barlow and Mary Barlow, other executors of the will, were decreed to pay the arrears of annuity then due to Mrs. Cocks, the widow, amounting to upwards of \$4,000, and to invest properly sufficient funds of the estate, which, together with those in the hands of Mrs. Haviland, should produce the annuity for the future.

The widow now presented an application reciting the above facts, and alleging that said Harrison Cocks and the Barlows had failed to pay said arrears of annuity, that they were insolvent, that they had no assets of the estate at the time of the entry of the decree and had received none since, that she had received no part of the sum so directed to be paid, nor of the annuity which had accrued since the entry of said decree, and praying for a decree directing said Phebe C. Haviland, as executrix, to pay the arrears of annuity now due to her, out of the funds of the estate in her hands.

JAMES A. HUDSON, *for petitioner.*

M. L. COBB, *for Mrs. Haviland :*

Objected that the proper parties had not been cited.

THE SURROGATE.—It is difficult to understand what provision of the 18th chapter of the Code, the counsel for the petitioner had in view, when the petition in this matter was prepared. The object is not to enforce obedience to a decree directing the payment of money, for those who were so directed are not made parties; nor does the proceeding seem to be instituted under the provisions of § 2717, for there is no prayer for a citation as therein provided, and if there were one prayed for as against Mrs. Haviland, it would not be sufficient, as, it seems, all of the executors should be cited under that section; nor is the object to compel Mrs. Haviland to show cause why she should not render an account, with the view to obtaining the payment of the legacy. It seems to be rather a general

statement of facts addressed to the equitable consideration of the court as if it were possessed of general common law powers, and without regard to the fact that its jurisdiction must be exercised only in the cases, and in the manner, prescribed by statute.

The decree referred to directs the executrices and executors to convert into money certain securities and assets then in the hands of Phebe C. Haviland, one of their number, and to invest the same as directed by the will, in her name as executrix. They were all interested in the performance of this duty; none of them have resigned or been removed, and they should, therefore, be made parties to any proceeding instituted by the widow to enforce what she claims to be her just rights under the will. The allegation in the petition that the Barlows and Harrison Cocks are insolvent, and have no assets of the estate in their hands, does not obviate the necessity of citing them, as they would otherwise be deprived of the right to file a written answer, as provided by § 2718 of the Code.

The application, in its present form, must be denied, with leave to the petitioner to renew it in such mode as she may be advised; it being suggested, however, that such a course ought to be adopted as will lead to a final judicial settlement of the account of the executors.

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MATTER OF DAVIDS.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—November, 1886.

MATTER OF DAVIDS.

In the matter of the estate of SARAH M. DAVIDS, deceased.

Code Civ. Pro., § 2754, providing that the Surrogate must issue a citation, according to the prayer of a petition praying for the disposition of a decedent's real property, where it appears that the debts or funeral expenses cannot be satisfied without resorting thereto (under *id.*, ch. 18, tit. 5), warrants the converse conclusion that, where such satisfaction may be effected without such resort, the citation should be refused.

Executors having presented a petition praying for the disposition of their decedent's real property, under the statute, it appeared that such property was devised, in trust for the benefit of decedent's husband during life, to petitioners, whom the will clothed with authority to sell the same, upon the consent of the husband, who was willing to give it, and that there was a deficiency of assets. The property not being "expressly charged with the payment of debts or funeral expenses" (Code Civ. Pro., § 2749), it was contended that a citation should issue.—

Held, that the executors should not proceed under the statute, but be left to exercise the power contained in the will; and that a citation might properly be refused.

Russell v. Russell, 36 N. Y., 581—distinguished.

PETER DAVIDS, who was the husband of the decedent, and a legatee under her will, filed an application for a citation requiring Peter T. Davids and Charles W. Johnson, the executors, to show cause why they should not render an account of their proceedings. The citation was issued and duly served, and during the pendency of that matter, the executors presented a petition with a view to the mortgaging, leasing or selling the real estate of the testatrix for the payment of her debts, by which it appeared that the debts and

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funeral expenses were about \$236, and the assets \$25. The will clothed the executors with a power to sell the real estate during the life time of the husband, on his consenting thereto in writing.

EDGAR K. BROWN, *for petitioners.*

THE SURROGATE.—All the matters required, by § 2752 of the Code, to be set forth in the petition, appear to be properly stated. Section 2754 provides that “where the Surrogate is satisfied that all the facts, specified in the last section but one, have been ascertained, as far as they can be upon diligent inquiry, and it appears to him that the debts and funeral expenses, or either, cannot be paid, without resorting” (doubtless, under the provisions of that title) “to the real property, he must issue a citation according to the prayer of the petition.” By looking into the will, it is ascertained that, while the testatrix directs the payment of her debts and funeral expenses, in the usual form, the real estate devised by her is not expressly charged with their payment, and hence it is claimed that it may be disposed of in order to pay them, as prescribed by § 2749. The petition is not required to state the provisions of the will in this respect, so that, it would seem, the fact must be ascertained by the Surrogate from other sources. In consulting the will, therefore, the fact is ascertained that the debts and funeral expenses are not so charged, as is above stated. But it is also found that the will contains these provisions:

“*Fourth.* I give, devise and bequeath all the rest, residue and remainder of my estate, both real and

MATTER OF DAVIDS.

personal, of what kind and nature soever, to my executors hereinafter named, in trust, to collect the rents, interest and income arising therefrom, and apply the same to the support of my husband, Peter Davids, for and during the term of his natural life, and should the interest, rents and income from my estate be insufficient for the comfortable support and maintenance of my said husband, then and in such case I direct my said executors to apply any or all of my estate, if necessary, to his support and maintenance."

"*Fifth.* I hereby authorize and empower my said executors, hereinafter named, if in their judgment it is best, to sell and dispose of any part, or all of my real estate, and give good and sufficient deeds of conveyance therefor, providing, however, such real estate shall not be sold during the life time of my said husband without his consent in writing."

Omitting the restriction of the power as contained in the fifth clause, from present consideration, the question would arise whether the court should order a sale under the fifth title of the 18th chapter of the Code, on the application of the executors, where the debts and funeral expenses were not expressly charged upon the real estate devised, and where the executors themselves were clothed with authority to sell. It would seem to be unjust, unreasonable and improper for the court to permit such a proceeding, as it could benefit no one, and would be burthening the estate with expenses to the injury of those interested. Why should it confer a power, with which the executors have already been clothed by the will? If they were to sell under that power, they could bring the pro-

ceeds into court, under the provisions of the Code, and they would be distributed as if they were derived from such a sale as the petitioners here seek. These considerations warrant the interpretation of § 2754 to be that, *e converso*, if it appear to the Surrogate that the debts and funeral expenses can be paid without resorting to the provisions of that title, he shall not issue a citation, according to the prayer of the petition.

As to the restriction on the power to sell contained in the will, it does not appear that the husband has refused, or is unwilling, to give his written consent to such sale. That fact should appear affirmatively, before any citation can be issued. But from what has occurred before me, I understand he is not only willing but anxious that the real estate in question should be sold.

In the case of *Russell v. Russell* (36 N. Y., 581), to which I am referred by the counsel for the petitioner, the action was ejectment. The executrix was, by the will, clothed with power to sell. Under that power, she conveyed some real estate to a creditor of the testator in satisfaction of his claim, when the assets were sufficient to pay all claims. It was held, by a divided court (DAVIES, Ch. J., and GROVER J., dissenting) that the power was not well executed, and that the conveyance was void. It was also held that the debts should have been discharged by means of the personal estate, and that the real estate could only be applied to that purpose, upon an order of the Surrogate to sell, after the personal estate had been exhausted. Some of the *dicta* of the learned Judge who

delivered the prevailing opinion in that case would induce a belief that he had overlooked the provisions of L. 1837, ch. 460, § 75, then in force, which authorized an executor making a sale under a power to bring the proceeds into court for distribution. However that may be, the case was unlike this in that there, the assets were sufficient to pay all claims, while here they are very insufficient. There the transaction was not deemed a sale as contemplated by the testator, but rather the extinguishing of a debt, while here an actual sale would be in strict accordance with the power conferred. The proceeds could then be brought into court, and, under the provisions of the Code, the debts and funeral expenses be paid, and the surplus be retained by the executors who are the devisees in trust, to enable them to fulfil the duties imposed upon them by the will.

As the power to sell does not carry with it a power to mortgage, and as the petitioners might, in this proceeding, ask for authority to mortgage, it would seem that even such an order should not be made in this case. The petition shows that there are now two mortgages upon the premises devised, given by the testatrix, amounting together to six hundred dollars, on which some interest is now due. If a new one should be authorized, so far as can be seen, some of the fund realized would be required to be kept in hand to pay the interest to accrue thereon. The rents do not appear to have been sufficient to pay taxes, repairs, insurance and the interest on the subsisting mortgages. Hence, it would not be wise to put a further burthen upon it, when the resources of the estate,

MATTER OF ACKER.

outside of the realty, amount to nothing. The estate might thus be made bankrupt, or the interests of all concerned be seriously jeopardized.

It strikes me, under all the circumstances, that the most prudent course for the executors to pursue, is to exercise the power to sell conferred by the will and thus save something for the beneficiaries. They will then be in a position to comply with the provision of the will which directs them, in case the rents, etc., are insufficient for the comfortable support and maintenance of the husband, to apply any or all of her estate to that purpose. The loving intention of the testatrix is thus clearly manifested; and the advanced age, feeble health and destitute condition of the surviving husband are appeals for speedy action which should not be disregarded.

Application denied.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—December, 1886.

MATTER OF ACKER.

*In the matter of the probate of the will of PHEBE
ACKER, deceased.*

A paper propounded as decedent's will consisted of a printed form, with decedent's signature written in a blank space in the body of the attestation clause, where it appeared that decedent had signed pursuant to the instructions of the draftsman, her physician, with the intent, understood by the witnesses, to effect a subscription of her will,—all the other statutory formalities having been observed.—

MATTER OF ACKER.

Held, that the instrument was subscribed, substantially, at the end, and that the same should be admitted to probate.

Sisters of Charity v. Kelly, 67 N. Y., 409—compared.

THE executors, Isaac R. Secor and Mary B. Jube, named in the will of the decedent, presented the same for probate. The will was prepared by the executor Secor, who was a physician, a blank form being used for that purpose, in which the usual formal parts were printed, as was also the attestation clause, with a blank space for the name of the testatrix to be inserted. Before any attempt at execution was made, the draftsman read it aloud to decedent, who declared it was as she desired it. She then took a pen to subscribe her name, and was told, by him, that the proper place to do it, was in the blank space in the attestation clause between the printed words "Subscribed by" ——— and "the testa——"; and she accordingly wrote her name there, in the presence of both of the subscribing witnesses. All the other formalities necessary to a complete execution were complied with.

THE EXECUTORS, *in person*.

THE SURROGATE.—This will must be regarded as sufficiently executed, in all respects. The only question relates to the subscription. That the place where she wrote her name was intended by her to be a subscription of her will, there can be no doubt, and it was that signature which the witnesses attested. That it was written in a blank space in the attestation clause, can make no difference, when it distinctly appears that it was intended by her, and so understood by the witnesses, as her subscription of the will, and it is, sub-

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stantially, at the end thereof. There is nothing in the case of *Sisters of Charity v. Kelly* (67 *N. Y.*, 409) which conflicts with this view.

The will is, therefore, admitted to probate.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—January, 1887.

ORSER v. ORSER.

In the matter of the judicial settlement of the account of JANE ORSER, as administratrix of the estate of JOSEPH B. ORSER, deceased.

Where an accounting executor or administrator holds in his possession vouchers for payments made by him, under \$20 in amount, the same should be produced and filed for the inspection of objectors. A refusal to pursue such a course upon demand would justify suspicion, and furnish the Surrogate sufficient reason for exercising the discretion conferred by Code Civ. Pro., § 2734, in refusing credit for the items concerned.

Metzger v. Metzger, 1 *Bradf.*, 265—compared.

THE administratrix filed an account of her proceedings, as such, together with vouchers for all sums paid out by her, amounting to twenty dollars and upwards. On the hearing, it appeared that she had in her possession vouchers for all sums paid out by her under twenty dollars in amount, aggregating about \$300. These last mentioned vouchers the objectors insisted should be produced and filed, which the administratrix declined to do. Whereupon the court was appealed to, for an order directing their production for filing.

W. G. VALENTINE, *for administratrix.*

D. S. HERRICK, *for Samuel Orser and others, next of kin.*

THE SURROGATE.—Under the R. S. (2 R. S., 92, §§ 54, 55), the executor or administrator was required to produce vouchers for *all* debts and legacies paid, and for all funeral charges, and just necessary expenses, which vouchers should be deposited and remain with the Surrogate, but he might be allowed any item of expenditure not exceeding twenty dollars, for which he produced no vouchers, if such item was supported positively, by his own oath, to the fact of payment, etc., but such allowances, in the whole, should not exceed \$500. One would suppose that under the provisions of the fifty-fourth section, he was bound to produce all the vouchers he had, and that, under the fifty-fifth section, he might be allowed each of the items of twenty dollars or under, when supported by his own oath. Surrogate BRADFORD, in the case of *Metzger v. Metzger* (1 *Bradf.*, 265) did not pass upon the precise question here presented. There, it did not appear that the executor or administrator had vouchers for the payment of amounts of twenty dollars or under. It would seem that, under the fifty-fourth section, he should produce them, and that the next section was intended to shield him from loss, in case he had failed to obtain or preserve them. While the Code (§ 2734) consolidates the sections referred to, it does not seem to alter their effect. It provides that the “accounting party must produce and file a voucher for every payment made, except in one of the following cases: 1. He may be allowed, without a voucher, any proper item of expenditure, not exceeding twenty dollars, if

it is supported by his own uncontradicted oath," etc. The language employed shows that the allowance or rejection of such items is discretionary with the Surrogate. It appears, in this case, that the administratrix is not "without a voucher," for the several items of credit claimed. For that reason, I think they should be produced, in order that they may be scrutinized by the contestants. The statute requires the production of all the vouchers which the accounting party has, whether they be for amounts less or more than twenty dollars. Having them for the small amounts, and refusing to produce them when called for, would be a ground for suspicion and furnish the Surrogate sufficient reason, under the exercise of the discretion conferred, for their rejection. The contestants have a right to inspect them, and then to raise such objections to them, and the payments they vouch, as they may be advised. The vouchers must be produced and filed, or the administratrix must run the hazard of a disallowance of the items.

I have deemed it unnecessary to allude to the authority which the court has, under § 2538, and § 803, and subsequent sections of the Code, to compel the discovery of books and papers, as it has sufficient power in the premises, without resort to those provisions.

MATTER OF LE FEVRE.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SUBROGATE.—January, 1887.

MATTER OF LE FEVRE.

*In the matter of the probate of the will of PETER E.
LE FEVRE, deceased.*

Testator's will devised and bequeathed all his real and personal estate, after payment of debts and funeral expenses, to his wife, "to have and to hold the same during the term of her natural life, subject nevertheless, to the conditions" of the will. Then followed clauses, authorizing her to sell any of the property, and purchase other property with the proceeds; to aid needy relatives; and to give of the estate for charitable and benevolent purposes; expressing testator's reliance solely upon his wife to remember their daughter when the former should die, and desiring that such child should receive an excellent education; and finally devising and bequeathing the remainder of the real and personal estate, after the wife was done therewith, to the daughter, her heirs and assigns forever.—

Held, as to the personalty, that the force of the clause expressly creating a limitation to the wife for life was overborne by the general scheme of the will, whereby she was clothed with an absolute and unconditional power of disposition; and that the clauses, subjecting the life estate to "conditions," and bequeathing a remainder, were nugatory and void.

On the probate of the will of the decedent, request was made that the court construe the same. The provisions to which attention was directed, and which embraced all of the disposing parts of the will, were as follows:

"After the payment of all my just debts and funeral expenses, I give and devise and bequeath to my dear and well-beloved wife all of my real and personal estate, wheresoever situated, that I may die possessed of, to have and to hold the same during the term of

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(her) natural life, subject, nevertheless, to the conditions of this will. I have an implicit confidence and trust in my dear wife, and I do hereby authorize and hereby empower her, my said wife to sell, and to purchase, any or all of my real or personal estate, and to reinvest the same, as in her good judgment may dictate, in other real or personal estate, relying solely upon my wife to remember our dear child Alice, when she, my wife, is done with the cares and toils of this world."

"And I also do hereby empower and authorize her, my dear wife, as in her discretion and judgment she may deem necessary and proper, to aid and assist any of our relatives or relations who shall or may be in distress, and require assistance at her hands. Remember, when I am beneath the sod and lost to sight, that it's my ardent wish that, as far as practicable and possible, you will follow this request."

"I do also hereby authorize and empower her, my said wife, to give for charitable and benevolent purposes, of my said estate, in such proportions as she may deem and seem able and desirable to give, for and to such charitable and benevolent purposes, and as her judgment may dictate. And finally, after my said wife is done with all of my real and personal estate, and she has gone to sleep in death, I do then bequeath and devise the remainder of my real and personal estate to our dear child, Alice, to her and her heirs and assigns forever."

"It is my wish and desire that our daughter, Alice Le Fevre, shall have the advantage of an excellent education, and this my dear wife, I am sure and

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sanguine, will see accomplished ; her desire is like my own, to do all that is just and proper for this dear child, our only one. ”

He appointed his wife, Mary Ann Le Fevre, executrix and Benjamin D. Le Fevre, executor of his will and empowered them to sell and convey his real estate. The will was made in 1870.

GIDEON W. DAVENPORT, *for the executors.*

THE SURROGATE.—Taking all of the provisions of the will into consideration, it would seem that the testator intended to give more than a mere life estate to his wife. Although he uses the words “during the term of her natural life,” yet he proceeds to clothe her with a power of disposal of the estate, inconsistent with a mere life estate. The words imposing conditions upon the gift of the estate for life, “subject, nevertheless, to the conditions of this will,” seem to lack any force, because the will nowhere imposes any “conditions,” within the ordinary meaning of the word, upon the wife. Probably the draftsman used it in the sense of “terms,” and, judging from the context, it would appear that the intention was to say: “and, in addition thereto, to have the authority and exercise the powers prescribed by the terms of this will.” There is nothing in the will signifying an intention to make the life estate “subject” to anything whatever, aside from the sentence quoted. He authorizes her to sell real and personal estate, and to purchase other real or personal estate ; to use his estate in aid of needy relatives ; to contribute, from the same source, to charitable and benevolent purposes ; and to give

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their daughter an excellent education. All this the wife is authorized to do, not as executrix simply, but personally. She is not, in any way, restricted to the income of the estate, as she would be, were it the intention to give her a life estate only. The testator, after authorizing her to sell and purchase property, closes with this language: "relying solely upon my wife to remember our dear child, Alice, when she, my wife, is done with the toils and cares of this world," plainly meaning to express his confidence that she will, by suitable testamentary directions, provide for Alice out of his estate of which he is speaking. And again, the last clause of the disposing parts of the will—"And finally, after my said wife is done with all of my real and personal estate, and she has gone to sleep in death, I do then bequeath and devise the remainder of my real and personal estate, to our dear child Alice Le Fevre, our only child, to her and her heirs and assigns forever," seems to show that the testator bore in mind that he had given to his wife the power to manage and dispose of his estate at her own pleasure, and that whatever of it might remain at her death undisposed of he wished to secure to the daughter.

The question is not without very serious difficulties; the peculiar structure of the will rendering it no easy matter, from the language employed, and the somewhat conflicting provisions of the instrument, to reach an entirely satisfactory conclusion; but the fact that the widow seems to be clothed with an absolute and unconditional power of disposition of the whole of the estate destroys the effect of the words, "during the term of her natural life," and renders nugatory the

provision in regard to the remainder. See *Smith v. Van Nostrand* (64 *N. Y.*, 278-284, and cases cited); *Campbell v. Beaumont* (91 *N. Y.*, 464). The title to the real property is vested in the wife either in fee, or in trust; and the ownership of the personal estate is either absolute or in trust. If she sell the real estate, she will convey in her individual name as grantor, and if she purchase other real estate, she will take title in the same way; and so of her dealings with the personal estate. The power so conferred to sell and purchase in her own name, being followed by the words, "relying *solely* upon my wife to *remember* our dear child, Alice, when she, my wife, is done with the cares and toils of this world," plainly vests the absolute ownership in the wife, upon whom the testator relies to provide by will, out of his estate so devised and bequeathed, for the daughter. No trust can be implied from the expression of the reliance by the testator upon his wife to "remember" the daughter (*Bardswell v. Bardswell*, 9 *Sim.*, 319). The fact that the testator provided by the limitation over—after his wife was done with all his real and personal estate, that the remainder, *i. e.*, what was left unspent, he gave to his daughter, shows that he intended to give the former power to dispose of the whole (*Ide v. Ide*, 5 *Mass.*, 500).

I am not unaware of the cogency of the express language, creating a limitation of the estate to the wife for life, but, as already stated, deem it to be overborne by the general scheme of the will. In the case of *Hoy v. Mester* (6 *Sim.*, 568), where the testator devised the whole of his property to his wife for life; at

her death, one third to his daughter, and the other two thirds to be at the sole and entire disposal of his wife, trusting that, if she should not marry again, she should make the daughter her heir; and the wife died unmarried, it was held that she took an absolute estate in the two thirds, notwithstanding the limitation for life. So, in *Gleason v. Fairweather* (4 *Grey*, 348), where a testator devised the use of all his real estate to one of his sons for life, "to the end that he may have the same for an inheritance so long as he may live, with no right to dispose of any part of the same, except such lots as I shall here designate, viz.: (describing four lots) all which he is authorized to sell to pay debts and legacies"; "all of which said lands he may dispose of at his option for the above purpose, if they should not be disposed of in my lifetime; the reversion of all which shall be at his disposal; and all the residue of my personal estate, not otherwise disposed of, I give to him to be at his disposal"; it was held that the devisee took an estate in fee in all the real estate, and that the restraint upon alienation was void. Hence, here, notwithstanding the apparent limitation for life, where the absolute disposal of the whole estate, to sell and purchase, to use for the support of needy relatives, and for charitable and benevolent purposes, is given to the wife, and under which provisions she might dispose of the whole of the estate, the reliance upon her to "remember" the daughter at the last, and the final phrase "after my said wife is done with all my real and personal estate," to my mind, indicate an absolute gift to the wife.

There is no express trust created by the will, and

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no trust can be implied where there is no obligation imposed (Perry on Trusts, sec. 116). The wife is simply empowered to do certain things which she may perform or not, at her pleasure.

Of course, this court can, on the probate, construe a will as to the personal estate only, but as both real and personal estate stand upon the same footing, as to the application of the principle discussed, it became necessary to examine the whole will, with a view to its proper interpretation as to the personalty.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—February, 1887.

MATTER OF JONES.

In the matter of the estate of JAMES JONES, deceased.

Under L. 1885, ch. 483, entitled "an act to tax gifts, legacies and collateral inheritances in certain cases," it is only necessary to appoint an appraiser where specific legacies, subject to tax, are given, or where taxable inheritances exist, or estates in fee are devised, or remainders, annuities, life estates, or terms of years are created.

The phrase, "lineal descendants," in the exemption clause of § 1, includes only those of the decedent.

The requirement of § 13, that an appraiser be appointed "to fix the value of property of persons whose estates shall be subject to the payment of said tax," has reference to the estates of persons taking, as legatees or otherwise, and not to the estate of the decedent.

Testator, who died leaving real and personal property, by his will directed the former to be sold, and disposed of the entire estate, in general legacies, without remainders, to descendants of deceased brothers and sisters, and to strangers in blood. The district attorney having applied (1) for the appointment of an appraiser to fix the value of the estate, and (2) for a citation, to all persons interested, to show cause why the tax imposed by L. 1885, ch. 483, should not be paid,—

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Held, (1) that no appraisal was required; (2) that the issue of the citation asked for was not provided for by the statute; and (3) that each application should be denied.

It seems, that the only mode which the Surrogate can employ, to enforce the liability of an executor or administrator to pay the tax imposed by the act in question, is to refuse to allow him credit, on his accounting, for the amount of such liability, unless he produce the voucher therein mentioned.

THE will of James Jones was admitted to probate in November, 1885. His estate consisted of personal property of the value of about \$50,000, and real property estimated to be worth \$20,000, which he directed to be sold. He left no widow or children, nor the descendants of a child surviving him. The property, thus consisting wholly of legal assets, was given in various sums to the children of deceased brothers and sisters and their issue, and to family servants. Application was made for the appointment of an appraiser to fix the value of the estate, with a view to the collection of the legacy tax, and the district attorney petitioned for a citation directing all persons interested to appear and show cause why such tax should not be paid.

D. VERPLANCK, *for District Attorney, for the applications.*

THE SURROGATE.—Chapter 483 of the Laws of 1885 is of so recent enactment that there have been but few decisions authoritatively construing its various provisions. Its constitutionality has lately been determined by the Court of Appeals, and it now remains for the courts and officials to carry it into effect.

It seems that, by the first section, all property or the income thereof, given by will to corporations or persons other than “to or for the use of father, mother,

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husband, wife, children, brother, and sister, and lineal descendants born in lawful wedlock, and the wife or widow of a son and the husband of a daughter, and the societies, corporations and institutions now exempted by law from taxation," shall be subject to a tax of five per cent. on the clear market value of such property. The phrase "lineal descendants" would seem to include only those who were lineal descendants of the testator or intestate, as appears more especially when read in connection with the next section, which provides, in substance, that when an interest for life shall be devised or bequeathed to a father, mother, husband, wife, children, brother and sister, the widow of a son, or a lineal descendant, with remainder to a collateral heir of the decedent, or to a stranger in blood, etc., the value of the life estate shall be deducted from the fair value thereof, as appraised, at the time of the death of the decedent, and the remainder shall be subject to tax.

Section 3 makes legacies to executors or trustees in lieu of commissions, where the amount exceeds legal commissions, and would otherwise be taxable, subject to the tax on such excess. By section 6, it is made the duty of the administrator, executor or trustee to deduct the tax from a distributive share or legacy, or, if the legacy or property be not money, he shall collect the tax on the appraised value thereof from the legatee or person entitled to such property, and if in money for a limited period he shall retain the tax upon the whole amount. Then follow other provisions of the act, which it is not now necessary to consider, until we come to § 13, which directs that

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the value of property of persons whose estates shall be subject to the payment of the tax, shall be fixed by some competent person as appraiser, to be appointed by the Surrogate, as often and whenever occasion may require, who shall proceed, as therein directed, to make such appraisal. He shall make a report in writing to the Surrogate of the value so fixed, together with such other facts as the Surrogate may require, who shall therefrom "forthwith assess and fix the then cash value of all estates, annuities and life estates or terms of years growing out of said estate, and the tax to which the same is liable, and shall immediately give notice," etc.

One question raised here, if pertinent, relates to the duty of the appraiser. The bulk of this estate is, as it appears, money or its equivalent. The whole is given away in legacies. The value of the money left by the testator cannot be the subject of appraisal, nor can the legacies, but only the estates, etc., if any, which are taxable. Some misapprehension seems to exist as to the range of the duties of the appraiser in fixing "the value of property of persons whose estates shall be subject to the payment of said tax." It appears to be generally assumed that the word "estates" means estates of decedents. This view is erroneous. The word "persons" preceding "whose estates," according to lexicographers, applies only to the living, and the statute clearly should be construed to mean "persons whose estates are inherited or are created by will shall be subject to the payment of the tax." Of course, in making the appraisal, the duty of the appraiser is confined

to fixing and reporting the value of any articles specifically bequeathed, as seems to be implied by § 6, if ordered by the Surrogate, and of the annuities, life estates, etc., which are taxable. Then the Surrogate shall assess and fix the then cash value thereof, and the tax to which the same are liable. The words "the same," doubtless, refer to life estates, annuities, etc. It will be observed that nothing is here said about fixing any value on legacies in money or in specie and the tax thereon. The tax on them and the collection thereof is sufficiently provided for by § 6, which directs the executor, administrator or trustee to deduct the tax from the share or legacy, and to collect the tax on the appraised value of the specific legacy before delivery. If, however, life estates in money or land are given to any of the persons exempt from the tax, with remainder over to any of the persons not exempt, then the appraiser will also be directed to report the value of such remainders, in order that the Surrogate may be enabled to fix the tax thereon. But as by the will, in this case, no such estates are created, and legacies in money only are given, and as the inventory abundantly shows that the estate far exceeds \$500 in value, there is no occasion for the appointment of an appraiser. The will directed the sale of testator's real estate, and therefore operated an equitable conversion of it into personalty, at the moment of his death. Hence, the whole of the estate is to be regarded as of that character, and the executors must retain the tax, as fixed by the act, out of the amount of each legacy, but an executor, etc., shall not, by § 8, be en-

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titled to credit in his accounts nor be discharged from his liability for such tax, unless he produces a proper voucher for the same from the county treasurer, sealed and countersigned by the State comptroller. If he shall fail to pay the tax on a money legacy, the remedy is by appropriate proceedings against him, if any be provided.

As an illustration of what would result from a construction which would require the whole estate of a decedent, any part of which is subject to the tax, to be appraised, let us suppose that a testator leaves an estate valued at \$200,000, consisting of real estate, a store of goods, money, bonds and mortgages, government bonds, etc., the whole of which is devised and bequeathed to his widow and children, except a legacy of \$100 to a servant, which is subject to the tax, then the whole estate would have to be appraised, in order to reach the five dollars tax on the legacy. The legislature could not have intended any such absurdity.

It is, therefore, only necessary to appoint an appraiser where specific legacies, subject to tax, are given, or where taxable inheritances exist, or estates in fee are devised, or remainders, annuities, life estates, or terms of years, are created; and it would seem that it is only in such cases, or some of them, that the county treasurer, under § 17, may notify the district attorney, who is required by § 16 to apply for the citation to those interested in the property and take the proceeding therein provided. And it is likewise only in such cases that the decree made may be docketed against the "persons interested in the property liable to tax." In short, it seems that

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neither the Surrogate nor the appraiser has anything to do with the tax upon taxable money legacies or distributive shares, except perhaps that the former may, to a limited extent, coerce payment thereof by the executor or administrator. In the latter case, the liability to pay the tax is imposed upon the legal representative; in the former upon the life tenant, remainderman, etc. The only method provided by the act that I can discover which the Surrogate may employ to enforce the liability to pay, imposed upon the former, is to refuse to allow him credit on his accounting for the amount of such liability unless he produce the voucher required by the act. His liability will continue, but no provision seems to have been made as to how payment shall be enforced by these courts. He is not within the purview of §§16 and 17, as they relate and apply solely to the persons interested in the property liable to the tax. If he, as frequently occurs, settle with the legatees who are all of age, and retain the amount of the tax in his hands, take releases and render no account, the county treasurer is empowered by § 21 to "collect" that as well as all other taxes. Of course, there being an obligation imposed on the executor or administrator to pay him, he may resort to any court of law to enforce payment. Briefly then, he must collect the tax on legacies and distributive shares from them, while on estates inherited or created by will, from the owners thereof, and in the latter case by proceedings provided for in §§ 16 and 17, or otherwise as he may be advised. It results, from the views expressed, that both applications should be denied.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—February, 1887.

CRAWFORD *v.* CRAWFORD.

In the matter of the estate of ELIZA BARKER, deceased.

Upon the return of a citation issued, in a special proceeding instituted under Code Civ. Pro., § 2606, as amended in 1884, by a legatee under a will, to compel the personal representative of a deceased executor thereof to account, with a view to payment of his legacy, the respondent cannot present a petition, under *Id.*, § 2728, for a judicial settlement of his account, and a citation to all persons interested in the estate of the first decedent to attend the same.

Popham v. Spencer, 4 *Redf.*, 401; *Spencer v. Popham*, 5 *id.*, 428—adhered to.

ELIZA BARKER died in December, 1876, leaving a last will and testament, of which Joseph S. Barker, her husband, became the duly qualified and acting executor. He died in September, 1885, leaving a will, of which Morris D' C. Crawford, David Reed and William A. Miller were the executors. On January 11th, 1887, Hanford Crawford, a residuary legatee named in the will of Eliza Barker, deceased, presented a petition praying that the executors of the will of the deceased executor be required to account for all his proceedings as such executor, and for the trust property belonging to the estate of Eliza Barker which came into his hands, or was under his control; and to deliver over the undistributed balance, if any. The executors of the will of Joseph S. Barker, on the return day of the citation issued upon said petition, presented an application, praying that all of the persons interested in the estate of Eliza Barker, deceased, be

cited to attend their accounting in regard to her estate.

WILLIAM D. LEONARD, *for Hanford Crawford.*

G. H. & F. L. CRAWFORD, *for executors, etc., of Joseph S. Barker, deceased.*

THE SURROGATE.—Since the decision of the cases of *Popham v. Spencer* (4 *Redf.*, 401) and *Spencer v. Popham* (5 *id.*, 428), section 2606 of the Code, which was the subject of construction in those cases, has been amended. While admitting the correctness of the conclusion there reached, the counsel for the present executors contend that, under such amendment, it is no longer tenable; that the proceeding, now sought to be taken by them, is warranted by that section as it now stands. If the view expressed before that amendment was sound, the alteration to its present phraseology does not seem to confer a power which was then deemed lacking; to wit, the power, sought to be invoked by the executors, of calling in all of the persons interested in the estate of Eliza Barker, deceased, to attend a judicial settlement of the accounts of the executors of the deceased executor. The effect of the amendment, in this respect, is only to enlarge the field of coercion. Formerly, they could only have been called upon to account for and deliver over any of the trust property which had come into their possession, or was under their control; while now, they may be compelled to account generally, for the whole estate. This, it seems to me, is the only effect of the amendment, in so far as the matter under consideration is concerned. No authority appears to

be given to the executors to make the present application.

The petition of Hanford Crawford states that Joseph S. Barker, as executor "proceeded to administer the estate of the said Eliza Barker"; and the counsel for the executors of the deceased executor, in their statement of facts, accompanying their brief, declare that the deceased executor "settled the estate, but had no final accounting." If the estate has been settled, then there is no "creditor or person interested" in it, who can be a party to any proceeding relating to it, in this court. If the creditor has been paid, he ceases to be a creditor; if a legatee has received the full amount of his legacy, his interest in the estate is ended. No successor to the deceased executor has been appointed, and no executor survives him. The present executors have no power to move in the matter (*Bunnell v. Ranney*, 2 *Dem.*, 327), and it is, therefore, impossible to conceive how any accounting, in regard to the estate of Eliza Barker, can be had, if it be true that the executor of her will settled her estate in his lifetime. Assuming that he did, then both applications should be denied. If he did not, then that of Hanford Crawford, provided any portion of his legacy remains unpaid, will be granted, and that of the executors denied.

MATTER OF GOVERS.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—February, 1887.

MATTER OF GOVERS.

*In the matter of the probate of the will of GEORGE
GOVERS, deceased.*

Where the proponent of a will, who was a beneficiary thereunder, died during the pendency of a special proceeding instituted to procure the probate thereof, leaving a will, purporting to dispose of all his property, which was thereafter proved,—

Held, that the orderly method of continuing the probate proceeding would be an *ex parte* application by the executor of the latter will to be made a party thereto, and, upon the granting of such application, a motion on notice for a revivor in his name as proponent.

GEORGE GOVERS died in 1885, leaving what purported to be a last will and testament. Ann Govers, his second wife, was named an executrix thereof and was the chief beneficiary. She offered the will for probate, and the same was contested by his children by his first wife. He had no children by the second. Pending the contest, the proponent died leaving a will, of which Thomas G. Carney, her brother, was appointed executor, which will was duly admitted to probate, and said executor took upon himself the burthen of the execution thereof. Said Ann Govers left, as next of kin, said executor, Francis H. Carney, Bridget Carney and Mary Campbell, her brothers and sisters. After the will of Mrs. Govers had been proven, said Bridget Carney presented a petition, which recited the facts, praying that the proceeding to prove the will of George Govers, deceased, be revived and

MATTER OF GOVERS.

prosecuted in the names of said brothers and sisters, and that they be substituted as the proponents in such proceeding. No notice of the application was given.

M. J. TIERNEY, *for the motion.*

THE SURROGATE.—As the will of Ann Govers purports to dispose of all of her estate, which will include the subjects of the devises and bequests to her in the will of her husband, if that shall, eventually, be admitted to probate, the executor of her will should take the necessary steps to revive the proceeding, as it is his duty to recover and secure the interests and rights belonging to her and her estate. He should first petition to be made a party to the proceeding, in place of the deceased proponent, stating the proper facts. That will be an *ex parte* matter. After being duly made such party, then he will apply, on notice to the other surviving parties, for an order reviving the proceeding in his name, as proponent. That would seem to be the proper practice in a case of this kind. When it shall have been done, the controversy in regard to George Govers' will, may be continued and brought to a conclusion.

It is not intended to be understood as holding that Bridget Carney, or any of the next of kin of Ann Govers, who are beneficiaries under her will, could not take measures to revive the proceeding, but it does not appear, from her petition, what interest, if any, she has thereunder. As the executor thereof, and, as such, bound to have regard to the interests of all, Thomas G. Carney seems to be the most proper person to apply in this matter.

MATTER OF HALL.

The present application may be withdrawn in order that the course above indicated may be pursued, if deemed advisable.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—February, 1887.

MATTER OF HALL.

In the matter of the estate of ABIGAIL HALL, deceased.

Whether a Surrogate's court has power, after the lapse of ten years from the entry of a decree judicially settling the account of an administrator, to open the same, upon motion of one of decedent's next of kin, and amend it by adding a clause directing a co-representative, who has never rendered any account, to pay to the applicant a specified sum as his distributive share of the estate—*quære*.

A., one of the next of kin of an intestate, and a distributee of her estate, received letters of administration thereof, in connection with B. as co-administrator, but never received any of the funds except her distributive share, and never rendered an account, although, upon an accounting by B., she was allowed a certain sum by way of commissions. She had entire confidence in B., and in his financial condition, entrusted her own money to him for investment, and remained passive in respect of the administration. In the absence of evidence tending to show knowledge on her part that B. was using the trust funds for his own purposes,—

Held, that she could not be made liable for his *devastavit*.

Wilmerding v. McKesson, 103 N. Y., 329—distinguished.

ACCOUNTING proceedings were commenced in this matter in 1873, and ended in 1877, by the entry of a decree. Jane E. Keleman, the administratrix, never rendered any account, nor was she a party to that proceeding, except as a next of kin, and distributee. The schedules of the account were signed by the ad-

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ministrator, John W. Mills, only, and he alone made the usual affidavit verifying the correctness of the account. It was, however, stated in the account and also in the decree, in substance, that Jane E. Keleman, never received any of the funds of the estate, but that Mills received the whole. No statement signed by her to that effect was contained in schedule G, or elsewhere in the account; but she was allowed commissions to the extent of \$600.

Again, when the accounting proceeding was commenced in October, 1873, it was stated in the petition that Agnes Hall was a minor having no general guardian. The decree stated that the citation was returned with proof of service on her and others, on April 17th, 1874, and that the Surrogate, having ascertained that she had no general guardian, appointed a guardian *ad litem* for her; that the matter was then adjourned from time to time until May 2d, 1877, when the account was filed; and that the guardian *ad litem* then appeared for said minor; that the decree was then entered, which directed the administrator, Mills, to retain her share, and the share of Charles A. Hall and another, *as their general guardian*, and that the administratrix, having received none of the money or property of the estate, was thereby discharged from all other accountability.

In 1880, Charles A. Hall having become of age, applied on petition and an affidavit, showing that Mills had never been appointed his general guardian, to have said decree amended by striking out the provisions in said decree directing said Mills to retain such shares, amounting to upwards of \$11,000 each, and

also to have the provisions discharging the administratrix from further accountability stricken out. The motion was resisted by Mrs. Keleman, the administratrix, but was finally granted in February, 1882, no one appearing for her on that day. In June, 1883, she moved to set aside the order granting the motion to amend the decree, but her application was denied, and the decision was, on appeal, affirmed.

During the period between 1880 and 1883, some arrangement was made by which Mills, who had become insolvent, transferred his real estate at White Plains to Clarence Carskaddan, in trust, to sell and apply the proceeds towards the payment of the unpaid distributive shares as fixed by the decree. What amount was thus realized did not appear. The administrator, Mills, had since died.

An application was now made by Agnes (or Mary Agnes) Hall, who had recently reached the age of twenty-one years, for an order further amending the decree on the accounting of 1877, by "adding thereto a clause directing and ordering the administratrix and administrator of said estate to pay over to the petitioner named in said petition her distributive share of said estate, to wit, the sum of \$11,188.23, with the interest thereon from May 2d, 1877." On the argument of the motion to further amend, there was presented by the counsel for the administratrix what purported to be a certificate of Stephen Van Dresar, Surrogate of Oneida county, to the effect that, on the 19th day of December, 1873, letters of guardianship of the person and estate of Mary Agnes Hall, of Vienna, in said county, a minor, were issued *by him*

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to John W. Mills. This certificate was dated the 18th day of October, 1880. It was shown, on the other hand, that during the year 1873, Joseph S. Avery was Surrogate of Oneida county, and continued in office until January 1st, 1878. A certificate of W. B. Bliss, the present Surrogate of that county, under his seal of office, was presented showing that, upon a search of the files of his office, he found no petition or bond in the matter of the appointment of a general guardian of Mary Agnes Hall, a minor, and that, as appears by the records of the office, no general guardian was ever appointed for said minor.

C. CARSKADDAN, *for the motion.*

JACOB F. MILLER, *opposed.*

THE SURROGATE.—At the time of the entry of the decree on accounting in 1877, or at some time since, it is alleged that Mills, the administrator, became insolvent and unable to pay all of the distributive shares then unpaid, and all the proceedings had since then have had in view the question of the liability of Mrs. Keleman, the administratrix. The amendment of that decree by striking out the provision directing him to hold the shares of the minors, as their general guardian, was made in accordance with the facts as then presented, and, as they now more clearly appear, was entirely correct. But I do not see how it is of any materiality on this motion. The amendment striking out the clause discharging Mrs. Keleman, the administratrix, from further accountability, simply had the effect of leaving open the question as to her liability. The motion now made touches that question directly.

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If she is legally liable, then the motion should be granted; if not, it ought to be denied. This is on the assumption that this court has, at this late day, any power in the premises. Conceding that it has, on the authority of *Orniston v. Olcott* (84 *N. Y.*, 339), and *Croft v. Williams* (88 *id.*, 432), it must be denied. The administratrix, it appears, never received any of the funds or property of the estate, as such, but did receive her distributive share only, and she has, in no discoverable manner, contributed to the alleged *devastavit*.

It is claimed, however, that she is liable, within the doctrine of the case of *Wilmerding v. McKesson* (103 *N. Y.*, 329). It seems fairly to be inferred, from the account filed by the administrator, that he did use the funds of the estate for his own purposes. The account charges Mills with interest thus: "Add interest on moneys while in hands of John W. Mills, administrator, as agreed upon between parties and fixed by the Surrogate, \$4,291.73"; and again, "the administrator, Mills, is chargeable with interest upon the balance remaining in his hands after July 20th, 1873, which has been agreed upon and fixed, by the parties appearing, at \$4,291.73." Assuming it to be true that he did use the moneys for his own purposes, that fact alone is insufficient to fix a liability upon the administratrix for any consequent loss. In *Wilmerding v. McKesson* (*supra*) it appeared that the co-executor, McKesson, had knowledge or the means of knowing that the moneys which were paid in to the other executor were used in the business of the firm of which the latter was a member; that he was not mere-

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ly passive, that he was active in the matter, advised as to investments, passed his accounts, consulted counsel, united in employing an accountant, etc. While here, the administratrix appears to have been perfectly passive. She had confidence in the administrator, and in his financial position. She entrusted her own funds to his care to manage, and invest for her, and prior to the accounting there is not a particle of evidence, express or circumstantial, that tends to show that she knew he was in any way using the funds of the estate. If she then learned it for the first, it did not concern her, as she was, by the decree then entered, discharged from liability, and her connection with the estate severed.

Believing the administratrix to be free from any liability for any *devastavit* of her associate, it is deemed unnecessary to discuss any of the other questions raised by her counsel in his brief; and it follows that the motion to amend the decree must be denied.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—March, 1887.

MATTER OF BURLING.

In the matter of the estate of SAMUEL BURLING, deceased.

An administrator with a will annexed, appointed upon the death of the sole surviving executor, is not within the purview of Code Civ. Pro., § 2724, in so far as that section restricts the power of a Surrogate, to permit or

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compel an accounting by an executor or administrator, to cases where one year has elapsed since letters were issued to him.

SAMUEL BURLING left a last will and testament, by which he bequeathed several general legacies, payable at the legal period, but gave to the executors, in trust, \$3,500, with directions to invest and pay the income to Ann Sutton during her life, with remainder over. Letters testamentary were issued, in April, 1868, to Joshua Sutton and Mellis S. Tilton, the executors, who in due time settled the estate, except only as to the trust fund. Tilton's letters were subsequently revoked, in consequence of his removal from the State, and the executor Sutton died. Then Ann Sutton died in the latter part of 1886, and, on the 7th day of January, 1887, John C. Burling and William Burling were appointed administrators with the will annexed. John C. Burling, having the trust fund in his possession, now presented a petition, praying for a citation, with a view to an accounting and a distribution of the same, and submitted the question, whether he might institute the proceeding at once, or should await the expiration of a year from the date of his letters.

L. C. PLATT, *for the petitioner.*

THE SURROGATE.—It is true that § 2724 of the Code seems to restrict the power of the Surrogate, to entertain or compel an accounting by an administrator, to cases where one year has elapsed since letters were issued to him; and that no provision is made, in that respect, in regard to an administrator with the will annexed, or an administrator *de bonis non*. In either case, he is called an “administrator,” and as such,

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some have supposed he was within the purview of the above section ; and this view, it was thought, was strengthened by 2 R. S., 72, § 22, which provides that an administrator with the will annexed shall observe and perform the will, and shall have the rights and powers, and be subject to the same duties *as if he had been named executor in the will*. This, it would seem, relates to his future rights, powers and duties. If an inventory has been filed by his predecessor, he cannot be required to file one. If notice was duly given, by the former, to creditors to present claims, and the time limited has expired while he was acting, no new notice should be given by the latter. If the estate is in a condition to be finally settled and distributed when it is devolved on the successor, he may proceed to the accounting at once. He simply steps into the place of the deceased legal representative, and his relations to the estate are precisely the same as those of his predecessor were at the time of his death. He discharges, simply, his unfinished duties ; except that the execution of an uncompleted personal trust, or a naked power to sell real estate, will not devolve upon him. There is no such trust or power involved in this case.

The proceeding for a judicial settlement will be entertained, in accordance with the prayer of the petition.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—March, 1887.

HOOD v. HOOD.

In the matter of the estate of ANDREW HOOD, deceased.

After a decree of a Surrogate's court has been sustained on appeal by the Court of Appeals, a motion made in the former tribunal, to vacate such decree, on the ground of irregularity in its entry, *e. g.*, because no findings of fact and conclusions of law were filed, will be denied. A motion of such a character must, at any rate, be made within the year specified in Code Civ. Pro., § 724.

As to whether Code Civ. Pro., § 1282, relating to a motion to set aside a judgment for irregularity, is applicable to decrees of Surrogates' courts—*quære*.

The testator died in 1864. An accounting was had by the executors, Frederick Hood and Maria L. Hood, before the Surrogate, in 1869. In 1883, the letters issued to Frederick Hood were revoked because of his having squandered and lost a great portion of the estate, in which Mrs. Hood had a large personal interest. Frederick Hood, being a non-resident of the State, when letters were first issued to him, gave the bond with sureties, which the statute then required in such cases. In 1885, he was cited to render his account, in which proceeding was entered a decree, in July of that year, directing him to pay to the executrix \$31,775 of moneys belonging to the estate. The bond was subsequently assigned for prosecution. An appeal was taken from the decree on the accounting to the Supreme court, which affirmed it. An appeal was then taken to the Court of Appeals, with a like result. A motion was now made in this court to

vacate and set aside said decree, upon the ground that it was improvidently and irregularly made, because no findings of fact and conclusions of law were filed.

A. J. DITTENHOEFER, *for the motion.*

JOHN J. MACKLIN, *opposed.*

THE SURROGATE.—It is difficult to conceive the object of this motion, except it be to throw further obstacles in the way of the recovery, by the widow and children, of the property justly belonging to them, and needed for their support. Their efforts in this direction have, for nearly ten years past, been constantly baffled. The decree complained of was affirmed by the Supreme court, and now it has become, by affirmance, in effect, the solemn judgment of our highest tribunal. It would seem an act of unjustifiable hardihood for this court to disturb it, in any manner. All that remains to it, is to enforce the decree. That the failure to file findings is not fatal to the validity of the decree is abundantly apparent from the opinion of the learned Judge who ably expressed the views of the Court of Appeals. He says: "His" (Frederick Hood's) "own counsel suggests the absence of requisite findings, insisting that, for such cause, the decree is irregular. *That does not follow.* It is the *duty of the party appealing* to procure to be made such findings or refusals as will present, through appropriate exceptions, the questions which he desires to argue." The appellant in that case never submitted any proposed findings, nor did he, as he might have done, present any requests to find, on the settlement of the case. It is, therefore, his own fault or negli-

gence, of which he here seeks to take advantage. This cannot be permitted.

The Supreme court, as in the case of *Waldo v. Waldo* (32 *Hun*, 251), might, perhaps, have sent the case back to the Surrogate, in order that the irregularity might be cured, but it did not; and the appellant chose to proceed with it, as it stood, to the court of last resort. In that court, an application was made for leave to make a motion for an order remitting the matter to the Surrogate, with a view to his filing findings, which application was denied. That the failure to file findings is a mere irregularity which does not affect the validity of the judgment, is likewise determined in the case of *Lewis v. Jones* (13 *Abb. Pr.*, 427). It was also held, in *Mayor v. Lyons* (1 *Daly*, 296), that an irregularity in the mode of entering a judgment is waived by an appeal from the judgment.

None of the authorities, to which I am referred by the learned counsel for the motion, seem to be in point in the matter under consideration.

No careful attention has been given to the question as to whether this motion has been made in time, under the provisions of the Code, but I am inclined to think it is too late. If § 1282 is not made applicable to Surrogates' courts, § 724 is. By the latter section, the motion must be made, within a year, for such relief as the section provides. However that may be, there seem to be no merits in the motion, for the reasons stated.

Motion denied, with ten dollars costs.

DE LAMATER V. HAVENS.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—April, 1887.

DE LAMATER v. HAVENS.

In the matter of the estate of HIRAM HAVENS, deceased.

A Surrogate's court has no power to disregard, relax or extend the operation of any of the General Rules of Practice.

The provision of General Rule 2, that "all papers served or filed must be indorsed or subscribed with the name of the attorney or attorneys, and his or their office address, or place of business," is sufficiently complied with, in the case of a notice of entry of a decree, where the name of the attorney subscribed to the notice is followed by the designation of a locality which is in fact his office, although not in terms described as such, or as his "place of business."

Further time to serve a case on appeal cannot be granted, after the period within which such service may be made has fully elapsed.

THE will of Hiram Havens, deceased, was admitted to probate, and a decree to that effect duly entered, on December 15th, 1886. A copy of the decree, with this notice endorsed thereon:

"Sir, Please to take notice that the within is a copy of an order this day duly made and entered and filed in the office of the Westchester county Surrogate

Dated 15th Dec., 1886. LEXOW & HALDANE,
atty's for Mary P. De Lamater, exr'x.,
etc., 46 Exchange Place, New York."

was served on the attorney for the contestants, and due service thereof and of the notice, admitted by him, in writing, on the 17th of the same month. The attorney for the contestants filed and served a notice of

appeal within the time limited by the statute, but failed to serve a proposed case and exceptions until the 7th of March 1887, the time to secure the same not having been extended by the court, nor by stipulation. They were returned the same day, with reasons given. No undertaking on appeal had been filed. A motion was now made to settle the case, and requests to find were presented by contestant. The motion was resisted on the ground that it was too late.

SMITH LENT, *for the motion.*

LEXOW & HALDANE, *opposed.*

THE SURROGATE.—The counsel for the appellant claims that he served the case in time, for the reason that his time was not limited, because of the failure of the counsel for the executrix to state their post office address, or place of business, in the notice endorsed on the copy decree served. Rule 32, of the General Rules of the Supreme court, provides that a copy of the case and exceptions shall be served “in the Surrogate’s court within ten days after service of a copy of the decree or order, and notice of the entry thereof.” It also provides that “the Surrogate, on appeals from his court may, by order, allow further time for the doing of any of the acts above provided to be done on such appeals.” As this court never allowed further time to serve a case, in this instance, and has no power to grant such time after the period within which it may be done has fully elapsed, it would seem that, under Rule 33, the service of such case must be deemed to have been abandoned.

The only question, therefore, appears to be whether

proper notice of the entry of the decree was given in December last. Under Rule 2, such a notice must be subscribed with the names of the attorneys and their office address, or place of business. The notice here was subscribed by the attorneys, and their office address was written thereunder, as being "46 Exchange Place, New York." In this, it seems to me, they fully complied with the Rule. It is not disputed that the above is their office address. The Rule does not require that the words "office address," or "place of business," as the case may be, shall be written under the names of the attorneys, but that the address shall be written as it was in this instance. Doubtless, the reason why the rule is in the alternative is to meet the case of a layman appearing as his own attorney. The lawyer is to give his office address, and the layman his place of business.

As has been stated, the Rule prescribes the time within which a copy of the proposed case and exceptions is required to be served. The Supreme court has power to establish such a rule of practice for this court (Code Civ. Pro., §§ 2545, 997); but it is quite clear that this court, recognizing such rule as binding, must be guided solely by it, and has no power to disregard, relax, or extend its operation, as that court may do in regard to its own rules. If the appellant consider himself entitled to relief, he should apply to the appellate court, at special term (Redf. Surr. Prac., 3rd ed., 807).

However much it may be a subject of regret that the attorney for the appellant is placed in this position,

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I do not feel at liberty to extend the rules beyond what I consider to be their true limitations.

Order accordingly.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—April, July, 1887.

KOWING v. MORAN.

*In the matter of the disposition of the real property of
NICHOLAS G. VERPLANCK deceased, for the pay-
ment of his debts.*

Where the committee of the property of a lunatic employs an attorney to perform professional services in a matter pertaining to his trust, the remedy of the latter, for his compensation, is against the committee, personally, and not against the fund which he represents.

An order of the Supreme court, confirming the report of a referee appointed to take and state the account of the committee of the property of a lunatic, after the death of the latter, and fixing the amount of such committee's claim, which it adjudges to be a "legal debt, claim and lien, in favor of the committee, against the estate of the lunatic, and against his legal representatives, in the same manner as if it had been a debt contracted by the lunatic in his lifetime," is conclusive upon a Surrogate's court, as to the character of the committee's claim as a debt of such decedent, in a special proceeding instituted to procure the disposition of his real property for the payment of his debts.

A Surrogate's court has authority, under Code Civ. Pro., § 2481, subd. 11. where a special proceeding has been instituted for the disposition of the real property, late of a decedent, for the payment of his debts, to order a discontinuance thereof, at the instance of the owner, upon payment, by the latter, of the claims established and the costs incurred.

In March, 1871, Odle Close was duly appointed committee of the person and estate of Nicholas G. Verplanck, a lunatic, who, with his sister Cornelia J., afterwards the wife of Francis Kowing, owned real

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estate as tenants in common, of the estimated value of from \$80,000 to \$100,000. The committee, by leave of the court, soon after his appointment, commenced an action for partition of the real estate, in which action William H. Robertson was his attorney. The action proceeded, as is alleged, to judgment, in which the costs and allowances were fixed at \$750. The judgment was never executed. The lunatic died in 1883, without issue or widow. Cornelia J. Kowing died intestate and without issue, in September, 1885, and her husband was appointed her administrator.

In November of the same year, the committee rendered his accounts, and the referee, appointed to take and state the same, reported that there was due to him the sum of \$1,509.50, which included the sum of \$750, being the costs and allowances in the action for partition. The court confirmed the report, and added to the amount found due to the committee the sum of \$150 for the costs and disbursements of the accounting, making, in all, \$1,659.50, which it "adjudged to be a legal debt, claim and lien, to all intents and purposes, in favor of said Odle Close against the estate of the said Nicholas G. Verplanck, and against his legal representatives, in the same manner as if it had been a debt contracted by said Nicholas G. Verplanck, in his life time," and it was ordered that \$250 be paid out of said estate to George Bell, Esq.: attorney for the administrator of Mrs. Kowing, deceased, for his disbursements and services on the accounting. James H. Moran, a creditor of Nicholas G. Verplanck, deceased, was, in 1886, appointed administrator of his estate.

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He now made application to mortgage, lease or sell his real estate for the payment of his debts.

M. M. SILLIMAN, *for administrator.*

ODLE CLOSE, *creditor in person.*

WM. H. ROBERTSON, *creditor in person.*

GEORGE BELL, *for Francis Kowing, administrator.*

THE SURROGATE.—On the hearing in this matter, in regard to the claims presented, it was objected on behalf of the administrator of the estate of Cornelia J. Kowing, deceased, that none of the claims, excepting that of the administrator of the estate of N. G. Verplanck, are chargeable against him, because they had their origin at a period when he was, by reason of having been judicially declared a lunatic, incapable of creating a liability of any kind. Whatever force there might otherwise be, to such an objection, is set at rest by the order of the Supreme court adjudging them to be a charge against his estate, to the same extent as if contracted by him. His committee stood in his stead, and was his agent, in law. Hence, the claims of Mr. Bell must be allowed.

The claim of Judge Robertson stands upon a different footing. It appears to be for services performed in the action for partition, instituted by the committee, as such. The petitioner states, in his petition, that the amount of the claim is \$500, while in the proof it is put at \$1,000, and is stated to be for services in the partition suit of Nicholas G. Verplanck against Cornelia J. Verplanck. Doubtless, it is intended as a charge in the action brought by the committee. Assuming that to be so, there was allowed,

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in that action, the sum of \$750 for costs and allowances, as appears by the report of the referee who took and stated the account of the committee, and it is embraced in the amount found due to him. The judgment in the action for partition is not before me as evidence, but the report of the referee aforesaid, and the order confirming the same, are. Of course, this court can make no allowance, as costs, for services rendered in that action; and if it could, it has no power to establish it as a debt against the deceased lunatic. If Judge Robertson is not sufficiently compensated by the \$750 allowed as costs in that case, his remedy is against the committee who employed him. This is understood, now, to be the settled rule in such cases. If an executor, a guardian, a trustee, or other person acting in a fiduciary capacity, employ an attorney, or other person, in any matter pertaining to his trust, the remedy of the person so acting is against the employer, and not against the fund he represents. This claim is, therefore, disallowed.

The claim of Mr. Moran, having been sufficiently proven, is allowed.

Decree accordingly.

IN this matter, proceedings were had up to a decree of sale, when Edwin W. Kowing, then owner of the premises decreed to be sold for the payment of the debts established, presented, in July, 1887, an application by his attorney, in which it was stated that he was ready to pay said debts and interest, and had so informed James H. Moran, the administrator of

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the estate of said Nicholas G. Verplanck, deceased, and asked that all further proceedings in said matter be stayed on paying the same, and the costs and expenses of this proceeding.

GEORGE BELL, *for the motion.*

JAMES H. MORAN, *adm'r, in person, opposed.*

THE SURROGATE.—A question as to the power of this court to grant this application is raised. Of course, the only object of the sale is to procure money with which to pay the debts of the deceased. If they can be paid otherwise, that object will no longer exist. If the present owner is willing to pay them, and thus save his property from the incidents and hazards of a sale, no good reason is apparent why he should not be permitted to do so. No one can suffer any injury thereby. The only question is as to the authority of this court in the premises. No provision, directly conferring it, is found in the 5th title of chapter 18 of the Code ; but it would be strange indeed, that none should exist, in a case so plainly calling for action.

The sale of real estate of deceased persons for the payment of their debts is expressly a subject of which it has cognizance, and subd. 11 of § 2481 authorizes it to proceed, in any matter not expressly provided for in that section, according to the course and practice of a court, having, by the common law, jurisdiction of such matters ; and to exercise such incidental powers as are necessary to carry into effect the powers expressly conferred. Before that section was adopted, it was well settled, that when a proper occasion arises to invoke the incidental powers of the

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Surrogate should not decline the exercise of
merely because the statutes are silent on
it. Here is found ample authority to war-
making of the desired order.

order be entered staying all further proceed-
is matter, on payment of the claims estab-
th interest to the date of payment, and the
costs and allowances of the proceeding, to
id on notice.

RICHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—April, 1887.

BARKER v. CRAWFORD.

*Order of the judicial settlement of the account
of MORRIS D' C. CRAWFORD and others, as exec-
utors of the will of JOSEPH S. BARKER, deceased.*

died without issue, and having had seven brothers and sisters,
hom had died before the execution of the will, leaving issue,
instrument, after giving various general, and other legacies,
he executors to divide the residue of his estate into equal
e more in number than the number of legatees mentioned in
ary clause; five of which shares were then given to four indi-
amed, and "one share to each of the children, living at the
y (his) death, of my (his) deceased" *brothers and sisters*,
g six of the latter successively; further providing: "But in
me or more of the children of either or any of my deceased
nd sisters mentioned in this clause of my will *shall die or*
before me, leaving lawful issue surviving at the time of my
n and in that case such issue of my deceased nephew or
I receive the share which his or her ancestor would have re-
der this clause of my will, had he or she been living at the
y death," with one exception.

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Of the brothers and sisters mentioned in the residuary clause, some children had died before, and none died after the execution of the will. It was contended that the object of the clause quoted was to substitute the grandchildren, for any of the children, of brothers and sisters who might die after the will was executed and before testator's death.—

Held, that the will manifested an intent on the part of testator that the issue of such children, of the six brothers and sisters mentioned, as were dead at the time of execution should take shares in the residue, as direct and not as substituted legatees.

THE testator, Joseph S. Barker, died without issue. He had had seven brothers and sisters, who were all dead at the date of his will, leaving issue. The names of the brothers and sisters were Isaac Barker, Nathaniel Barker, Thomas B. Barker, Elijah C. Barker, Jane Hart, Mary Crawford and Frederick Barker. By his will, among other bequests, he gave general legacies of \$1,000 each to the two granddaughters of his brother Isaac; to a grandson of his deceased brother Nathaniel \$2,000; to three children of Dorinda Edwards, who were grandchildren of his deceased brother, Thomas B. Barker, each \$1,000; to a grandson of his deceased brother, Elijah C. Barker, \$2,000; to two children of Joseph B. Crawford, being grandchildren of his deceased sister, Mary Crawford, \$1,000 each; to two children of Mary Stevens, who were grandchildren of said Mary Crawford \$1,000 each; to the children of Samuel Crawford, deceased, \$2,000 each; to the son of Almira Mickel, a daughter of said Mary Crawford \$1,000; and to the three daughters of his deceased brother, Frederick, \$700 each. He also gave to the children of Mary Jane Gordon, grandchildren of his deceased brother Thomas B. Barker, who should be living at the time of his death, the sum

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of \$1,000, to be equally divided between them. The seventh clause of the will is as follows:

“Seventh. All the rest, residue and remainder of my said estate I direct my executors to divide into equal shares; the number of said shares to be made one more than the number of legatees hereinafter mentioned in this clause of my will; and I give, devise and bequeath and I direct my executors to pay the amount of the said rest, residue and remainder of my said estate after being divided into equal shares, as follows: Two of such shares as provided for to Grace Place, the wife of Barker Place. One share to Marion, daughter of Barker and Grace Place. One share to Emeline Hayward, daughter of my deceased niece, Susan A. Place. One share to Isabel Sullivan, daughter of my deceased niece, Susan A. Place. One share to each of the children living at the time of my death of my deceased brother, Isaac Barker. One share to each of the children living at the time of my death of my deceased brother, Nathaniel Barker. One share to each of the children living at the time of my death of my deceased brother, Thomas B. Barker. One share to each of the children living at the time of my death of my deceased brother, Elijah C. Barker. One share to each of the children living at the time of my death of my deceased sister, Jane Hart. One share to each of the children living at the time of my death of my deceased sister, Mary Crawford, but in case any one or more of the children of either or any of my deceased brothers and sisters mentioned in this clause of my will shall die or have died before me leaving lawful issue surviving at the time of my death,

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then and in that case, such issue of my deceased nephew or niece shall receive the share which his or her ancestor would have received under this clause of my will had he or she been living at the time of my death, excepting in the case of the issue of Lemuel Crawford, deceased, to whom this clause shall not apply. The children of the said Lemuel Crawford, deceased, having been left a legacy in a former clause of this will." Under one interpretation of this will the number of shares would be 17, and, under the other, 27.

G. H. & F. L. CRAWFORD, *for executors.*

J. K. HAYWARD, *for Emeline P. Hayward, one of 17.*

ROSCOE H. CHANNING and P. J. O'REILLY, *for some of 17 class.*

WALTER EDWARDS, JOSEPH S. WOOD, JAS. F. RANDOLPH and GWILLIM & MEYERS, *for Charles S. Barker and others of the larger class.*

THE SURROGATE.—Had the testator died intestate, the statute of distribution would have restricted the takers of the estate, which is made wholly legal assets by the will, to brothers' and sisters' children. The testator clearly intended to go beyond such restriction in the disposition of his estate, and the question is whether such intention reached so far as to include issue of deceased brothers and sisters so as to render the residue divisible into twenty-seven shares, or to confine it to seventeen. This question depends upon the construction of the seventh, or residuary, clause of the will, taken in connection with the rest of the instrument, and the facts of the case, which, it is understood, are agreed upon. One of these facts is that none of the children of the deceased brothers or sisters died intermediate the date of the will and the death

of the testator, and another is that there are at least sixteen persons who are entitled to seventeen of the number of shares into which the residuum shall be divided.

It is further conceded that, at the date of the will, ten children of his brothers and sisters had died, leaving issue, and that, hence, if their issue are within the intention of the testator, as ascertainable from the will, the number of shares will be swelled to twenty-seven.

The learned counsel engaged have cited a large number of authorities, mostly English, on either side of the question. On examination, as might have been expected, none of them are precisely in point, because in each case, while there are some points of resemblance and some general rules of construction are formulated and followed, yet the particular case, in so far as the language of the will and its grammatical construction are concerned, is *sui generis* and such is nearly ever the case. The supreme effort in all the cases is, to ascertain the true intent and meaning of the testator. The amount of the residuum is stated to be about \$112,000. Whether some of the beneficiaries will receive more or less than some others, dependent upon this or that construction, would seem to be of little importance, provided we are able to reach a just conclusion as to what was intended. No one will dispute his right to make an unequal distribution of his estate.

The seventh clause, which is the subject of chief consideration here, directs the executors to divide the residue and remainder into equal shares. The testa-

tor does not specify the number of shares, but leaves that to the executors to ascertain. He then proceeds to give the several shares, so ascertained, to individuals and to classes. The individuals are Grace Place (two shares), Marion Place, Emeline Hayward and Isabel Sullivan (one share each). The classes are the children of his deceased brothers and sisters living at the time of his death, to whom he gives one share each. It is ascertained that, reckoning these only, there would be seventeen shares.

The testator, however, then proceeds to say "but in case any one or more of the children of either of my deceased brothers and sisters mentioned in this clause of my will shall die or have died before me, leaving lawful issue surviving at the time of my death, then, and in that case, such issue of my deceased nephew or niece shall receive the share which his or her ancestor would have received under this clause of my will, had he or she been living at the time of my death, excepting in the case of the issue of Lemuel Crawford, deceased, to whom this clause shall not apply."

It is claimed on the part of those desiring to confine the shares to the smaller number, that the object of this part of said clause was simply to substitute the grandchildren for any of the children of brothers and sisters who might die intermediate the date of the will and the death of the testator; while it is insisted by those advocating a construction which will increase the shares to the larger number, that the intention was, not only to include those who died during the intermediate period, but also those who died prior

thereto. It seems to me that the latter is the proper construction. The word "mentioned," following the words "brothers and sisters," clearly applies to the brothers and sisters mentioned in that clause, and not to the word "children." As to the words "shall die or have died," the first contemplate the then future, while the latter relate to the past. As none did die between the date of the will and the death, the former are of no practical importance ; but as some had died anterior to that date, it is to be fairly inferred that the expression was designed to apply to them. Added force is given to this view when we consider the exception in the case of the issue of Lemuel Crawford, deceased. He was a son of testator's sister, Mary Crawford, and he was dead when the will was executed. This clearly shows that the intention was that the issue of nephews and nieces, who were then dead, should take under the will, and that Lemuel's issue would so take, but for the exception. A sufficient reason is given why they are excepted.

This construction is in harmony with our knowledge of the laws of natural affection. It may be fairly assumed that, *non constat*, the issue of nephews and nieces who had died before the will, were as near and dear to the heart of the testator, in fact, as in blood, as were those whose parents might die during the period between the making of the will and the death of testator.

It follows, therefore, that the children of those deceased nephews and nieces take as direct, and not as substituted, legatees.

Decree accordingly.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—May, 1887.

McCORD v. LOUNSBURY.

*In the matter of the application for probate of a
paper propounded as the will of WILLIAM
ODELL, deceased.*

Upon an application for probate, the evidence showed that the draftsman, L., after preparing the will, being requested by decedent to summon two neighbors to attest its execution, asked the latter to visit decedent, in order to witness "a paper," or "his will," it did not appear which; that they accordingly attended, and were directed by L. to affix their names to a paper and at a place indicated by him, which they did, decedent having first subscribed it, the paper being so folded, at the time, as to conceal its contents from view; that the attestation clause, appended thereto, was not read to or by the witnesses, of whom one did not remember that the character of the instrument was stated, while the other testified positively that the word "will" was not mentioned at the interview, although L. swore that he asked decedent, in the witnesses' presence, whether he wished them to witness his "last will and testament," and received an affirmative answer, which conversation, however, was not shown to have been heard by the witnesses.—

Held, that probate must be refused for want of due publication.

As to whether probate should be accorded to a paper, propounded as a will, consisting of a printed form, with insertions in the handwriting of proponent, and presenting a blank space of one and a half pages between the last disposing clause and the commencement of a paragraph appointing executors—*quære*.

THE facts of this case sufficiently appear in the opinion.

D. W. TRAVIS, *for proponent*.

STEPHEN LENT, *for William M. Barton, guardian ad litem*.

ROBERT McCORD, *for Mary E. McCord*.

THE SURROGATE.—A paper purporting to be a will

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of William Odell deceased, bearing date in January, 1881, has been propounded for probate by George W. Lounsbury, one of the executors therein named. The deceased left, him surviving, his children Alonzo Odell, Mary E. McCord and Jackson Odell, and three minor children of his deceased daughter Louisa J. Tuttle whose husband, John M. Tuttle, is their general guardian. The special guardian contests the probate chiefly on the ground that the alleged will was not executed in accordance with the requirements of the statute, and especially, on the ground that there was not a sufficient publication of the instrument. It was prepared by George W. Lounsbury, the proponent, who seems to have supervised its execution. He used a blank form such as is sold by stationers. These forms, in the hands of unskilled laymen, often lead to difficulty and have frequently been condemned by the courts. In this instance there is a blank space of fully one and one half pages between the end of the last disposing clause and the commencement of the paragraph appointing executors. Thus an opportunity was furnished, to a fraudulently disposed person, to insert, after its formal execution, any other provisions an evil heart might suggest. Mr. Lounsbury had possession of the paper from the day of its date, until he produced it in court. It was, where written, in his handwriting, and thus the opportunity for the insertion of other provisions was presented; but his well known character for probity forbids the idea that he availed himself of it. This could scarcely be said of every one in his position, and hence, such risk should be avoided. What would the courts say of a

will entirely written, with such a blank space as we here find? I am inclined to think they would deem it a sufficient ground for its rejection (Heady's will, 15 *Abb. Pr.*, N. S., 211).

However this may be, there are other reasons why I think probate of the will should be refused. The facts in regard to the preparation and execution of the paper are substantially these. Mr. Lounsbury had been requested by the decedent to prepare a will. He accordingly went to his house, and after conferring with him, asked whom he would have for witnesses, when decedent spoke of Mr. Lent and his wife. Lounsbury then went for them, stating to James H. Lent that he wished them to go to Mr. Odell's to witness a paper, or his will. Neither Lounsbury nor Lent can say which expression was used. Arrived at the house, Lent says, "Lounsbury walked to the table where some papers lay and asked me to sign my name at such a place, mentioning where it was. I did so. I believe that was all that was said before I signed my name, but don't remember. After I signed my name I stepped back, and Mr. Odell spoke upon some ordinary subject, and I left after staying some three or four minutes. That is all that took place, except my wife signed her name immediately after I did, and that was all that was said in her hearing or presence. Mr. Odell first signed his name." No portion of the will nor any part of the paper was read by or to the witnesses. Mr. Lent further says that he did not remember that either Mr. Odell or Mr. Lounsbury said what the paper was, and that he signed it at the request of the latter. Mrs. Lent testifies that she

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went with her husband to Mr. Odell's, saw him sign the paper, that then Lounsbury showed her and her husband where to sign their names, and they signed accordingly. She swears positively that the word "will" or any equivalent word was not used while she was there, or, if used, that she did not hear it, that she would have heard it, if it had been uttered.

Mr. Lounsbury testifies that he went with the witnesses to Mr. Odell's house, and that, when they went in, he asked the decedent: "do you want Mr. Lent and his wife to be witnesses to your last will and testament?" and he said "yes"; that the paper was so folded that no part of the contents preceding the words "to be executors" was visible. Then decedent signed it, and he showed the witnesses where to sign. This is the substance of the testimony, so far as it is material upon the point in question.

There is no evidence of the size of the room, or the relative positions of the actors, the tone of voice of Mr. Lounsbury when putting the alleged question to the testator, and other like details calculated to aid in the solution of the question. The witnesses are all above the usual average of intelligence, and of unquestionably good character. It is quite evident to my mind that either Mr. Lounsbury is mistaken in regard to his having put the question to the decedent as testified to by him, or that it was put in such a manner as to fail to catch the attention of the subscribing witnesses. Mr. Lent does not remember hearing the word "will" used, and his wife testifies positively that it was not used in her hearing; and I believe her statement.

The statute wisely requires a publication of the nature of the instrument, to the subscribing witnesses, as a safeguard against fraud. If there be no such publication the instrument cannot be regarded as a will. None of the numerous cases relating to the question here presented controvert this position. All the attention is directed to the simple question, was there such a publication made, in view of all the attendant facts and circumstances. Wills have been held validly executed where the witnesses' memory has failed as to publication, or request to sign, when satisfactory evidence of others shows that the statute was complied with in these respects, and so also in certain extreme cases, against the positive evidence of the witnesses, where their honesty was seriously questioned and they discredited. But where the attestation clause was not read to or by the witnesses, as in this case, and where one fails to recollect publication and the other testifies positively against it, I think the will should be refused probate, although another person present testify to such publication, but fails to show that it could have been heard by the witnesses. If one did not hear it, it was not published to both, as the statute requires, and the paper does not become a will.

Probate refused accordingly. The costs of this proceeding must be paid out of the estate, by the administrator when appointed.

TRUST CO. V. HALL.

WESTCHESTER COUNTY.—HON. OWEN T COFFIN,
SURROGATE.—June, 1887.

TRUST CO. v. HALL.

*In the matter of the judicial settlement of the account
of the FARMERS' LOAN & TRUST COMPANY, as
trustee of CHARLES HALL, and others, under the
will of JAMES P. HALL, deceased.*

Where trustees invested \$48,000 on mortgages which were subsequently foreclosed at an expense, for costs, taxes, etc., of \$5,680.69, and the property was bid in by them for \$32,500, and subsequently sold by them for \$50,250,—

Held, that the difference between the last two sums was not profit, on which a life beneficiary could base a claim for income—the whole amount invested, including costs, etc., exceeding the amount realized; the result being a loss to the estate, by reason of the investment, of over \$2,000.

Roosevelt v. Roosevelt, 5 Redf., 264—distinguished.

Testator's will gave the use of one half of his estate for life to a daughter, remainder over; and the other half to four infant grandchildren, to be paid to them, in equal shares, as they respectively became of age. Of the latter, J. became of age in 1876, when an accounting was had as to his share, and he was paid the same, in full, including his share in the mortgages then outstanding. Subsequently, as each of the other grandchildren became of age, they were not, on the accountings had, paid in full; but reservations were made, of sums supposed to represent their interests in such investments, which sums varied in amount on the different accountings.—

Held, that such sums were merely speculative, and did not determine each one's interest in what was ultimately realized.

The basis for distribution, in such case—fixed.

JAMES HALL died previously to 1873, leaving a last will and testament. He left him surviving a widow, one daughter, Jane E. Kelemen, and four grandchildren, viz: James R. Hall, Abigail Hall, Charles Hall and Agnes or Mary Agnes Hall. After making suita-

ble provision for his wife, he gave one half of the residue of his estate, in trust, to his executors, to apply the rents, interest and income arising therefrom, to the use of his daughter Jane, during her life, and, at her death, to convey said share to her issue, or if she should leave none, then to the grandchildren above named. The other half was to be held in trust for said grandchildren, to be equally divided among them; and their respective shares, with the income thereon, was to be paid to them as they severally became of full age. Cornelius J. DeWitt and Gershom B. Weed qualified and acted as executors and trustees. The former died subsequently to 1873, the latter continuing to act as trustee down to about 1882, when he died, and was succeeded by the Farmers' Loan & Trust company, the present trustee. In June, 1873, the executors rendered an account, and a decree was entered by which the share of Mrs. Kelemen, of which she was entitled to the income, was fixed at \$93,517.25, and the share of each grandchild at \$23,379.31.

In May, 1876, the executors purchased a mortgage given by Harriet Sanford to Jane E. Kelemen, to secure \$50,000. This had been assigned by Mrs. Kelemen to Samuel E. Lyon, and by him to the then trustee, for \$37,000, as nearly as could be ascertained. It was foreclosed by the trustee, who, in 1879, bought in the property mortgaged, for \$25,000, the amount of the judgment, for principal, interest and costs, being \$44,071.48. The trustees also invested \$11,000 on a mortgage given by one Martine, which was subsequently foreclosed, and, in 1880, also bought in by the trustee, for \$7,500, the amount of the judgment

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being about \$12,000 for principal, interest, costs, etc. After the investments, and before the foreclosure of these mortgages, in 1876, James Hall became of age; an accounting was had as to him, in which these mortgages were reckoned, and he was paid his share of the estate, and receipted therefor, in full. In 1878, Abigail Hall became of age, and a like accounting was had as to her share, and she was paid the same, including her interest in the Sanford mortgage, in full, except only the Martine mortgage, in which her interest was estimated to be \$1,333.91, or one eighth of its supposed value. Charles became of full age in 1880, when a like accounting was had as to his share, and there was found due and paid to him \$28,945.16, exclusive of his interest in the Sanford property which had been purchased and which, estimating the value of the property at \$25,000, was placed at \$3,125 (one eighth), and also exclusive of his interest in the Martine property, which, estimating the property at \$7,500, was placed at \$937.50, or one eighth, and further, excluding a Hopkins mortgage in which his interest was estimated at \$500. Agnes became of age in 1886, when an accounting was duly had as to her share, when she was paid in full, with the exception of her interest in the same investments; that in the Sanford property being estimated at \$4,728.54, and in the Martine property at \$2,051.54, or one eighth of the estimated value of the whole.

The Sanford property had lately been sold for \$45,000, and the Martine property for \$5,250. All parties were before the court.

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TURNER, LEE & MCCLURE, *for trustee.*

TOWNSEND WANDELL, *for Jane E. Kelemen.*

CLARENCE CARSKADDAN, *for Agnes Hall and others.*

THE SURROGATE.—The facts in this case are mainly gathered from the records and files in the office, and from statements made by counsel in their briefs. No oral testimony was taken, and no charge is made that the present trustee or any of its predecessors have culpably mismanaged the affairs of the estate. The chief question concerns the distribution of the fund admitted to be in hand. This amounts, without reckoning some small matters of income and payments, to \$50,259. As James Hall has been paid his share in full, including the Sanford and Martine mortgages, then outstanding, he has no interest in the matter.

Counsel, in their briefs, dwell much upon the different modes of stating the interests of the parties, adopted on the various accountings that have been had. This is calculated to lead the mind astray from a just and comprehensive view of the subject. It seems immaterial to a proper adjustment, at this stage of the case, that different amounts, based upon hypothetical values of the securities, which varied on the occasion of each settlement, except in the case of James, were deducted from such values. Such estimates were merely tentative, with a view, apparently, of showing approximate results, at different times. The whole subject was left open to abide the event of the conversion into money. That event has occurred, and more has been realized than was estimated, but as nearly as I can discover, less than the sums originally invested. The excess, therefore, over the estimated

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value, cannot be treated as income. Nor does the fact that the two parcels together have sold for more than the added amounts for which they were bought in, render the excess an accretion or increase of the estate. It is only restoring to the estate what was taken from it in order to make the investments in the first place. Hence, it must be regarded as a part of the *corpus* of the estate, and must be dealt with as if it were an original integral part of the assets of the deceased. In no sense can it be regarded as income, as is the contention on the part of Mrs. Kelemen.

There is then a principal fund of \$50,250 for assignment and distribution among those entitled. It would be a very simple matter to assign one half to the fund of which Mrs. Kelemen is entitled to the income and one eighth to each of the four grandchildren; but this cannot be done because James has been finally settled with, and has had his share of it, while Abigail has already received her share in the Sanford investment but is still entitled to her share of what the Martine property realized. Thus, the matter is somewhat complicated. It does not appear how either of them was paid, whether out of the pockets of the trustees, or otherwise. At all events, it is agreed that they were so paid. If the trustees paid them, they have a right to reimbursement. But no claim is made to that effect on behalf of the trustee Weed during whose administration they were paid, nor was any made by his administrator in 1882, when he accounted for and paid over the trust fund in Weed's hands to the present trustee. If he took the funds from other portions of the estate, they must be re-

placed. Should it appear, in either event, that the legatees were paid less than what would otherwise have been their just proportions, the difference will not belong to the trustees, but must be properly divided between Mrs. Kelemen's interest, and Charles and Agnes.

The fact that James and Abigail have both abandoned or discharged any claim on account of increase in the Sanford investment, does not clothe the amount, to which they would have otherwise been entitled, with the character of a lapsed legacy. Even were it such, it would not fall into the residuum, of which Mrs. Kelemen and the Hall children are the legatees, for the reason that the surviving residuary legatees cannot take the lapsed legacy of a co-residuary legatee. This would involve the absurdity that it would pass to the next of kin, among whom they are numbered, when they had released their claim.

It is not easy to understand how it happens that James R. has been paid his full share of both mortgages, and Abigail her full share of the Sanford mortgage, and yet that the proceeds of both now in hand for distribution are more than the original investments. If the amount paid for the Sanford mortgage was \$37,000, the sum of the two shares paid to them was \$9,250; add the full share of the Martine mortgage paid to James R. and the amount is about \$10,500. The mystery is, whence was this sum, so paid, derived. As counsel have not touched upon this question in the briefs submitted, it must be assumed that it is susceptible of a solution which leaves the fund to be distributed among those now apparently

entitled to it. All have been settled with and paid, or had assigned their interest in all of the estate, except these Sanford and Martine matters, save James, fully paid. After the settlements with James and Abigail, these mortgages were foreclosed, and the properties purchased by the then trustee, at an expense of \$4,680.69 to the estate, for costs, taxes, etc., incurred and paid before the present trustee was appointed. This sum added to the amount originally invested makes the whole cost, \$52,680.69, for which there is to show \$50,250, the difference being the net loss to the estate. Hence, counsel are in error in basing any arguments upon the theory that there has been an increase of the fund.

Under all these circumstances, the difficult question recurs as to how the fund in hand shall be divided among those having an interest in it. The will gives one half to Mrs. Kelemen, and the other half in equal shares to the four grandchildren, but one of them has been fully paid without it, and another has only a partial interest. But Mrs. Kelemen and Charles and Alice only, are interested exclusively in the Sanford proceeds—which is \$45,000. If it were divisible among all, according to the will, Mrs. Kelemen would take as her half \$22,500 and each grandchild one quarter, or \$5,625, but as two have, as stated, been paid, it must be divided also among the three, regarding the rule fixed by the will. The two shares thus paid amount together to \$11,250. Of this sum Mrs. Kelemen will take \$7,500—making the whole amount of her share \$30,000, and Charles and Agnes will each take \$1,875—making the share of each \$7,500—

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together \$15,000. As to the Martine investment, James' share alone has been paid, and the division among those entitled will give Mrs. Kelemen her half, \$2,625, increased by her share of James' one eighth (say, \$656.05) \$375.05, making it \$3,000.00—while each of the three shares of Abigail, Charles and Agnes (\$656.25) will be increased \$93.75, making each of their shares \$750.

The statement for distribution will, therefore, stand thus:

Mrs. Kelemen, share account Sanford			\$30,000
" " Martine			3,000
			<hr/>
			\$33,000
Abigail, share Martine			750
Charles, "	Sanford	\$7,500	
	Martine	750	\$8,250
			<hr/>
Agnes, "	Sanford	\$7,500	
	Martine	750	\$8,250
			<hr/>
			\$50,250

Subject, of course, to commissions, expenses, etc.

It may be proper to remark that the various trustees very properly never separated the funds into shares and made investments for each beneficiary, but invested for all. I am not informed as to whether Mrs. Kelemen has issue to take the remainder after her life interest is ended, or whether these four grandchildren will probably take it, nor is it regarded as of much moment. No reason is discovered for going into any calculation as to what portion of the fund to be distributed is to be regarded, as capital, and what portion income, first, because there is no sum to be considered in the light of income, and no question as

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between a life beneficiary and remaindermen, and second, because the loss or gain, occurred on loans made by the trustees in the course of administration, in making investments and not by the decedent. The case of *Roosevelt v. Roosevelt* (5 *Redf.*, 264) is, therefore, not in point. As I have endeavored to show, there was a loss of upwards of \$2,000 growing out of these investments, and that can only be apportioned by according to each a proper share of the fund remaining. If Mrs. Kelemen has issue who are remaindermen as to her share, they are not before me, and their rights could not be affected by any adjudication here made. As no complaint is made as to the conduct of any trustee in the matter, it would not seem that Mrs. Kelemen is entitled to any interest other than that actually earned. Of course, Abigail, Charles and Agnes are also, and for a like cause, deprived of such interest as their portions might otherwise have earned.

I have not aimed to give exact figures, for a decree, nor to go into detail as to the income from, and expenses incurred in carrying, the Sanford and Martine properties. A ready excuse for this is found in the fact that no account appears to have been filed. Those are matters of detail. The effort has been to fix some proper basis for the distribution of the fund remaining on hand. As to other matters, counsel can be heard on the settlement of the decree; and especially on any matter that may have been overlooked.

Costs, to be taxed, are allowed to all parties, out of the fund.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—July, 1887.

HAWLEY v. SINGER.

*In the matter of the judicial settlement of the account
of DAVID HAWLEY, as guardian, under the will
of ISAAC M. SINGER, deceased, of ADAM M. SINGER.*

Certain decrees of a Surrogate's court, awarding commissions to one as testamentary trustee of an infant, having been set aside on appeal, upon the ground that the person receiving such award was guardian and not a trustee,—

Held, that the court, in determining the amount of his commissions as guardian, should proceed as if he were for the first time rendering his account in that capacity.

Where the record of a judgment shows that the same could have been rendered, without deciding a particular matter afterwards brought in question between the same parties, such matter will not be considered as having been finally determined, and the judgment will not be deemed *quoad hoc, res adjudicata*.

A judgment of the Supreme court, rendered in an action brought to determine whether an executor was bound to sell corporate stock, in the course of administration, or deliver it to legatees,—under the provisions of a will which ordered the executor not to sell the stock, but to deliver a certain number of shares to each legatee,—directed that the stock should pass to the legatees specifically and be delivered to them in specie.—

Held, that this was not an adjudication that the bequests of stock were specific, in such a sense as to deprive the executor of commissions upon the value thereof.

The amount of commissions of a general guardian of an infant's property, under Code Civ. Pro., § 2736—determined.

THE Court of Appeals reversed the decision of this case, reported in 3 *Dem.*, 589, on the ground that the Surrogate erroneously refused to allow the contestant to introduce evidence tending to show that the accounting party had been guilty of fraud in obtaining some prior decrees in the same matter; and the same

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court set aside those decrees, on the ground that the Surrogate lacked jurisdiction to make them, for the reason that Mr. Hawley was simply guardian, and not trustee; and the whole matter was sent back to the Surrogate, to determine what commissions, if any, should be allowed to him as guardian.

CALVIN FROST, *for guardian.*

C. E. TRACY, *for contestant.*

THE SURROGATE.—The clause in the will, which has given rise to this controversy, appoints the executors, guardians and trustees of the estates of the minor legatees, which are given to them for their sole and separate use, benefit and behoof, to continue such until they became of age. The intention of the testator was, doubtless, to appoint them guardians of the persons, and trustees of the estates of the minors. The court of last resort has seen fit to ignore, or disregard the words “trustees of the estate,” and to treat Mr. Hawley, the only acting executor, as guardian only. It is needless to speculate in regard to what conclusion that court might have reached, had it determined to disregard the word “guardian” instead, and thus leave him “trustee of the estate” (see *Ward v. Ward*, 6 *N. Y. State Rep.*, 798). When the case was formerly before me, it does not appear that any question was raised as to his being a trustee, and he was treated as such by both parties.

The only material questions to be considered here are those relating to the right to, and the amount of, the commissions to which Mr. Hawley, as guardian is entitled. The prior decrees, in which he was allowed

commissions as trustee, having been set aside, we are to proceed simply as if he were, for the first time, rendering an account in the capacity fixed upon him.

The will of Isaac M. Singer, deceased, under which he was acting, was admitted to probate previously to 1877, and long before chapter 18 of the Code of Civil Procedure took effect. Until the act of 1877 (chap. 206, § 4), letters of guardianship were not issued to a testamentary guardian, and no such letters were ever issued to Mr. Hawley. It is needless to inquire whether § 2738 is made applicable to an accounting of this character by § 2850, as, by an amendment of the latter section, made by chapter 143 of the Laws of 1887, the former section has ceased to give rise to any such inquiry. But § 2736 still stands, and will be applied to such an accounting, in a proper case.

Here he should be allowed the same commissions as an executor or administrator, as provided by § 2850 and the amendment thereof by chapter 400 of the Laws of 1882. Aside from the fact that, when the executor rendered his account in 1877, the decree discharged him as such, and directed him to hold the fund for the future, as guardian and trustee, he will now be entitled to full commissions on the final accounting, as such guardian, on all moneys received and paid out. And here arises the subordinate question as to whether he is entitled to commissions on the shares of stock in the Singer Manufacturing Company. In the opinion delivered by me (3 *Dem.*, 589), it was held that he was entitled to commissions on that stock, as it was not a specific bequest. This was expressly approved by the Court of Appeals; but counsel for

HAWLEY V. SINGER.

the contestant has introduced a copy of a judgment record of the Supreme court, entered in 1879, in which Mr. Hawley was plaintiff and Margaret A. Mathews and seven other legatees of Singer, including this contestant, were defendants, wherein it seems to have been held that this stock "should pass to them specifically and be delivered to them in specie," and the counsel claims that this is an adjudication, binding upon this court, to the effect that this contestant's share of that stock was a specific bequest, on which, therefore, the accountant is entitled to no commissions.

It should be borne in mind that the apparent object of that action was to determine whether the executor's duty was to sell and convert the stock into money, in the due course of administration, or whether, under the provisions of the will, he must retain it, and deliver it, in the proper proportions, to the legatees, when they respectively became entitled thereto. The subject of commissions did not enter into the case. The will directed the executor not to sell the stock, but to deliver a certain number of shares to each. Thus in a certain sense it was specifically bequeathed, in so far as to forbid a sale by the executor, but not in the strict sense which the law defines as necessary to render a legacy specific. The court used the phrase, apparently, in a dictionary, rather than in a legal sense. A high authority has held, on the subject of a former adjudication, that, "if the record shows that the verdict or other adjudication could not have been had without deciding the particular matter now questioned, it will be considered as having finally determined it" (*Packet Co. v. Sickles*, 5 *Wall.*, 592).

The converse of the proposition will hold equally true, that, if it could have been had without deciding the particular matter now questioned, it will *not* be so considered. In the case referred to, the adjudication could have been had upon the single fact, that the executor was forbidden to sell the stock, but required to deliver it to the legatees. It was wholly unnecessary to determine whether the legacies were specific or not. Had it been so, and the attention of the able jurist who sat in the case been called to the question, there can be little doubt entertained that he would have held the legacies to be general and not specific. It is claimed on behalf of the accountant that, if that decision is to be regarded as *res adjudicata* on that subject, it must be given its full effect, and thus as establishing the fact that the accountant is "trustee of the estate" of the contestant. But as to this, I think the same line of reasoning, employed in showing that it cannot be regarded as determining the character of the legacy, will lead to a like result; and that it should not be considered as having the force and effect of a former adjudication, in either instance. The guardian is, therefore, entitled to commissions on the Singer Manufacturing Company stock. There is some question as to the value of the shares of this stock. It is in evidence that there have been a few sales at \$150 per share. It is also shown that the stock is held by a few persons, that it is not on the market, and that its intrinsic value is, at least, \$200 per share. A few sales made under peculiar circumstances, and not in what is known as "open market," can hardly be considered as a criterion of value.

Where sales frequently occur, as in case of stocks bonds, etc., in open market and amid competition, the prices given or received will fix the values for the purposes of courts and juries; and so of farm produce, lumber, merchandise, etc., but an occasional private sale cannot be allowed that effect. The value of this stock, for the purpose of commissions, is fixed at the same sum per share, as it was rated at when they were allowed before; which is believed to have been \$175.

I think the accounting party entitled to commissions on the value of the government bonds at the time they were turned over to the contestant. He chose to take them instead of the money they represented at the time.

There is no reason discovered why the opinion formerly expressed by me, in relation to commissions being allowed on funds received and paid out by Mr. Hawley after the ward became of age and before the accounting, should be deviated from. They were allowed then, for the reasons stated, and the decision, in that respect, has not been disturbed.

The contestant claims that he should be allowed interest on the sums which the guardian, wrongfully, as the Court of Appeals holds, was allowed on the void accountings. This seems, from the authorities cited by his learned counsel, to be largely, if not entirely, a matter of discretion. Mr. Hawley has acted throughout in good faith. The question as to commissions was, in an informal way, and without that active opposition calculated to stimulate careful investigation, submitted to the court. Conceding that they were al-

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lowed by the court, when, in the light of the recent decision, they should not have been, that fact furnishes no sufficient reason why he should be punished, in this way, for no fault of his.

A decree, in accordance with these views, should be entered. Costs are allowed to both parties, out of the fund.

KINGS COUNTY.—HON. ABRAHAM LOTT, SURROGATE—July, 1886.

MATTER OF CORNELL.

*In the matter of the estate of CATHARINE CORNELL,
deceased.*

The word "issue," when used in a will, as designating substituted beneficiaries, with naught in the context to restrict its meaning, extends to remote descendants of the ancestors indicated, and is not confined to their children.

CONSTRUCTION of decedent's will, upon the judicial settlement of the account of the executor thereof.

The sole dispositive clause in the will was as follows: "I give, devise and bequeath all my estate, real and personal, unto my brothers who shall survive me, and to the issue of such of my brothers as have heretofore died or may hereafter die, each brother to take one share, and the issue of each deceased brother one share, and to their heirs, executors, administrators or assigns forever."

At the time of the execution of her will, decedent

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had (1) brothers, and (2) nephews and nieces, children of deceased brothers. She left, her surviving, (1) brothers, (2) nephews and nieces, children of deceased brothers, and (3) grandnieces and grandnephews, offspring of deceased children of deceased brothers. The question was whether the more remote issue took under the will.

J. W. OSBORNE, *for executor* :

Contended that "issue" meant "children"; and cited *Palmer v. Horn* (84 *N. Y.*, 516); *Murray v. Bronson* (1 *Dem.*, 217); *Taft v. Taft* (3 *id.*, 86); *Kirk v. Cashman* (3 *id.*, 243).

PEABODY, BAKER & PEABODY, *for grand nieces and grand nephews* :

Cited *Murray v. Bronson* (1 *Dem.*, 217); *Scott v. Guernsey* (48 *N. Y.*, 106); *Lynes v. Townsend* (33 *id.*, 218); *Low v. Harmony* (72 *id.*, 408); *Rowe v. Underhill* (4 *Hun*, 130); *Matter of Brown* (95 *N. Y.*, 295).

JAS. H. GILBERT, and SAMUEL D. OSBORNE, *for grandnieces and grandnephews*.

THE SURROGATE.—The words, "I give, devise and bequeath all my estate, real and personal, unto my brothers who shall survive me, and to the issue of such of my brothers as have heretofore died or may hereafter die," without anything restricting the meaning of the word "issue," should, I think, be held to include the descendants of a deceased brother.

It is not reasonable to impute to the testatrix an intention to exclude wholly from the inheritance the descendants of either of her brothers (*Matter of*

MATTER OF SMITH.

Brown, 93 *N. Y.*, 295), and I think, therefore, that it is a true construction of the will, and that it was the intention of the testatrix that her estate should be distributed, *per stirpes*, among her brothers and the descendants of deceased brothers.

KINGS COUNTY.—HON. ABRAHAM LOTT, SURROGATE.—December, 1886.

MATTER OF SMITH.

In the matter of the estate of JOHN W. SMITH, deceased.

Under L. 1885, ch. 483, imposing a tax upon property passing by will, intestacy, or transfer taking effect after the death of the transferor, to a person other than "father, mother, husband, wife, children, brother and sister and lineal descendants born in lawful wedlock," etc., the exemption of *descendants* extends only to those who occupy that relation towards the testator, intestate, or person making the transfer described.

The design of the proviso, in the first section of that act, "that *an estate* which may be valued at a less sum than five hundred dollars shall not be subject to said tax or duty," is to exempt small legacies, etc., from the imposition,—the *estate* specified being that of the taker, and not that of the testator, intestate, or transferor.

APPLICATION by George B. Abbott, public administrator of Kings county, for the judicial settlement of his account as administrator of the estate of John W. Smith, deceased.

CHARLES M. OTIS, *for public administrator.*

WILLIAM B. DAVENPORT, *general guardian, in person.*

MATTER OF SMITH.

THE SURROGATE.—The tax is imposed upon all taking, except “father, mother, husband, wife, children, brother and sister, and lineal descendants born in lawful wedlock, and the wife or widow of a son, and the husband of a daughter, and the societies, corporations and institutions now exempted by law from taxation. Provided, that an estate which may be valued at a less sum than five hundred dollars shall not be subject to said tax or duty.”

Two questions are submitted regarding the construction of this: (1) Are the words “lineal descendants” restricted to descendants of the ancestor? (2) Does the word “estate,” in the exemption clause, refer to the entire estate left by the ancestor, or to the share coming to the person, society or corporation liable to taxation?

In answer to the first question, it is submitted that the words “lineal descendants” are restricted to those of the ancestor; the section refers to the relation of all the persons named to the ancestor. It is not at all ambiguous. But if more were wanted, the same words are used again in the second section of the act, and provision is made for the taxation of a remainder when left “to a collateral heir of the decedent, or to a stranger in blood.” This, I think, is decisive as to the proper construction being as here claimed.

As to the second question, I think it evidently refers to the “estate” given the person liable to taxation, and for the following reasons: (1) It could not concern the legislature what the extent of the decedent’s estate amounted to. If he had a million, and gave to persons deemed by him worthy (but not of

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the exempt class) \$100, each, no possible reason could exist for taxing those legatees because he had given so much more to persons who were not liable to taxation. (2) The provisions of the second section show that the legislature intended only to value a remainder going to those not exempt. The solution of the second question is not quite so clear as it might be, but still I think it accords with the intention of the legislature, and I think the amount of the tax also shows that it was not intended to be placed on small legacies.

KINGS COUNTY.—HON. ABRAHAM LOTT, SURROGATE.—March, 1887.

MATTER OF ROBERTSON.

*In the matter of the estate of ROBERT A. ROBERTSON,
deceased.*

In appraisals made under L. 1885, ch. 483, entitled "an act to tax gifts, legacies and collateral inheritances in certain cases," the value of a life estate is to be ascertained by reference to the tables of mortality adopted by the General Rules of Practice.

OBJECTION taken by Elizabeth A. Marshall, a stranger in blood to decedent, and a life beneficiary under his will, to the appraisal of her interest, made for the purpose of taxation under L. 1885, ch. 483.

SMITH, WOODWARD & BUCKLEY, *for executors.*

FISHER & VOLTZ, *for life legatee.*

MATTER OF ENSTON.

THE SURROGATE.—The appraiser has computed the value of the life estate in this case according to the rules of the Supreme court. It is claimed this is inequitable here, because the physical condition of the legatee makes it unlikely she will live the period the annuity table states as the probable duration of her life. I think it was intended that, under the collateral inheritance act, estates for life should be valued according to the rules of the Supreme court. The Court of Appeals has sustained the use of the Northampton tables to show the probable duration of life, in an action for damages (*Sauter v. N. Y. C. R. R. Co.*, 36 *N. Y.*, 50).

The appraisal is affirmed.

KINGS COUNTY.—HON. ABRAHAM LOTT, SURROGATE.—April, 1887.

MATTER OF ENSTON.*

In the matter of compelling payment of the amount of tax upon the property given by the will of HANNAH ENSTON, deceased, to collateral relatives, etc.

Property within the State, passing by the will of one who died a resident of another State, to persons not within the classes exempted by L. 1885, ch. 483, entitled "An act to tax gifts, legacies and inheritances in certain cases," is subject to the tax thereby imposed.

* Affirmed at Brooklyn Gen. Term, July, 1887.

MATTER OF ENSTON.

THE petition of James W. Ridgway, as district attorney of Kings county, set forth that, by order of the Surrogate of Kings county, dated March 26th, 1887, William Murray was appointed appraiser, to appraise the property within this State, of decedent, a resident of the State of Pennsylvania, who departed this life in the State of South Carolina, October 26th, 1886, and whose will was admitted to probate at a Surrogate's court of Kings county, on November 4th, 1886; that said appraisement was directed for the purpose of fixing the amount of tax to which her estate was subject by virtue of chapter 483 of the laws of 1885; that on April 4th, 1887, the said appraiser rendered his report of that date, and filed the same in the office of said Surrogate, from which it appeared that, after due notice to Joel W. Sherwood and Robert J. Miller, the executors of the will, he had duly made the appraisement directed, and fixed the amount of tax at \$42,177.05; that the executors had refused to pay the tax and it remained unpaid, notwithstanding that abundant funds were in their hands applicable to the payment thereof, and the county treasurer of Kings county had notified petitioner in writing that the tax remained unpaid, and petitioner had probable cause to believe that the same was due and unpaid; and prayed for a citation directed to the executors, commanding them to show cause why the tax should not be paid.

A citation was issued accordingly, and, after a hearing, the Surrogate found that decedent died October 26th, 1886, at Spartansburg, South Carolina; that she never resided or had her domicil in the

MATTER OF ENSTON.

State of New York, but, at the time of her death, resided and had her domicil in Philadelphia, in the State of Pennsylvania; that she left real estate situated in the State of New York of the clear market value of \$125,575, and personal property consisting of bonds secured by mortgage upon real estate in the State of New York of the clear market value of \$471,650, and promissory notes and bonds of foreign municipal corporations and stocks and bonds of other foreign corporations of the fair market value of \$246,316.11; all of which she devised and bequeathed to nephews and nieces and strangers in blood; that the said personal securities were at the time of her death within the State of New York; that the moneys invested in the said bonds and mortgages had been sent into this State for investment, by testatrix, to an agent by whom they were thus invested, and the securities remained in this State for collection.

And as conclusions of law, that the tax provided for by chapter 483 of the laws of 1885 upon the succession of said real and personal property, amounting to five per cent. of the value thereof, to wit, \$42,177.05, was due from the executors of the will of Hannah Enston to the State of New York and payable to the county treasurer of Kings county; that there should be judgment directing said executors to pay the same and directing that they be allowed a deduction of five per cent. in case they should pay the same on or before April 26th, 1887.

And the Surrogate ordered judgment accordingly, with \$70 costs and \$200 additional allowance, to be

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paid to the district attorney by the executors out of the assets of the estate.

JAMES W. RIDGWAY, *district attorney*, and JOHN F. CLARK, *for the people*.

KENNARD BUXTON, and JOSIAH T. MAREAN, *for executors*.

THE SURROGATE.—The tax sought to be recovered in this matter is upon property within this State passing by will, and therefore is within the terms of the act, chapter 483, laws of 1885.

While the grammar of section one of that act is questionable, yet I think the meaning of the law is not doubtful. If it was, then in view of the policy of encouraging the migration of foreign capital into this State (*William v. Board of Supervisors*, 78 *N. Y.*, 565), and because taxation may be imposed here and in Pennsylvania upon the same property, the act in question might by construction be limited to embrace only the property of residents of this State passing by will or the intestate laws of this State; but where acts of this character have been restricted by construction, the courts have proceeded upon the ground that the legislature had not sufficiently expressed its intention to depart from theretofore well settled rules as to taxation (*Thompson v. Advocate General*, 12 *Cl. & Fin.*, 1; *Wallace v. Attorney*, *L. R.*, 1 *Ch.*, 1; *U. S. v. Hunnewell*, 13 *Fed. Rep.*, 617).

I think it was intended to subject to taxation all property within this State passing by will (to other than certain excepted persons) without regard to the residence of the ancestor, and the provisions of sections eleven and fifteen of the act in question sup-

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port this construction. It is conceded for the executors that property passing by grant to take effect at the grantor's death is subject to the tax, without reference to the residence of the grantor, and that the tax on property so transferred was designed to prevent an evasion of the tax by resort to such conveyance. It would follow, if the construction contended for by the executors was allowed, that property of a non-resident passing by will would be free of tax, while property passing by grant from a non-resident, to take effect in possession at the death of the grantor, would be liable to taxation.

I am of the opinion that both real and personal property within this State passing by the will of the testatrix is subject to the tax.

MADISON COUNTY.—HON. A. D. KENNEDY, SURROGATE.—November, 1886.

COOK v. WOODARD.

In the matter of the estate of REUBEN P. WILCOX, deceased.

Upon a distribution of the proceeds of a disposition of a decedent's real property, made as prescribed in Code Civ. Pro., ch. 18, tit. 5, "debts not yet due" at the time of entry of the first decree are entitled, under id., § 2793, subd. 7, to equality in payment with those established by and recited in such decree.

An executor or administrator cannot be allowed, out of such proceeds, his expenses, incurred in defending an action brought against him by a creditor of the decedent, the provisions of Code Civ. Pro., § 2793,

COOK V. WOODARD.

subd. 5, being only intended to cover payments made by the executor or administrator on account of debts of the decedent and funeral expenses.

UPON the judicial settlement of the account of Orlando Woodard, as executor of decedent's will, it appeared that the personal estate had been nearly exhausted in expenses of administration, and that the proceeds of a sale of the realty, which had been made under the statute, were sufficient to pay only a small proportion of the debts. Questions arose as to the right of Rosina Cook, a creditor of decedent, to share in the distribution of those proceeds; also as to the executor's right to receive thereout the amount of certain expenses incurred by him in the administration; the facts as to which appear in the opinion.

A. N. SHELDON, *for executor.*

WHITE & UNDERHILL, *for Rosina Cook.*

E. H. LAMB, *in person, and for widow.*

THE SURROGATE.—[After deciding other matters] We now come to the discussion of the claim of Rosina Cook. It will be remembered that the decedent died the 28th day of March, 1881, and his will was admitted to probate June 20th of that year. At the time of his death, Mrs. Cook, of St. Johns, Michigan, was the owner and holder of a promissory note against him, of which the following is a copy:

“\$3100. March 29, 1878.

Six years after date I promise to pay to the order of S. B. Daboll, three thousand one hundred dollars for the value received with use.

R. P. WILCOX.”

Endorsed “S. B. Daboll.”

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The executor duly published a notice to creditors, and on the 18th day of March, 1882, the claim in question was duly presented to the executor and the same was disputed and rejected by him, and the rejection was accompanied by an offer to refer the claim under the statute, but the executor having refused to waive the objection that the note was not yet due, and at all times insisted that no action or proceeding could be commenced upon the same until it became due, a reference was deferred until the note matured. On December 29th, 1884, the claim was referred, under the statute, to three referees.

After a trial upon the merits the referees made their report, awarding to the plaintiff the full amount of her claim. Their report was duly confirmed, and on May 17th, 1886, judgment was duly entered thereon for

Damages.	\$4861.30
Costs	406.58
Judgment	<u>\$5267.88</u>

The petition for the sale of the decedent's real estate was filed on May 22d, 1882. The petition refers to the claim in question as having been presented to the executor and rejected by him. Mrs. Cook was duly cited in this proceeding, but did not appear and made no effort to prove her claim upon the first hearing.

On March 17th, 1883, a motion was made before Surrogate Chapman to open the decree of July 25th, 1882, for the purpose of allowing Mrs. Cook to prove her claim and have the same established by and as of the date of said decree. The Surrogate denied this motion upon the ground that the claim was not

then due, and without prejudice to its renewal. The motion was renewed before the present Surrogate on July 22d, 1885, and was denied by him for want of jurisdiction, more than one year having elapsed since the entry of the decree.

Mrs. Cook's claim has been duly proved and established upon the hearing for distribution. The proceeds of the sale of the real estate are not more than sufficient to pay the claims established upon the first hearing. Upon these facts, a serious question arises as to the status of Mrs. Cook's claim, in this proceeding. Counsel for Mrs. Cook contends that she is entitled to share *pro rata* with the creditors whose claims were established upon the first hearing, and counsel for the executor urges that the claims established upon the first hearing are entitled to payment in full, before any portion of the proceeds can be applied to the payment of the claim in question.

The only serious question in the case arises from the fact that, at the time of the entry of the first decree, the claim in question was not yet due. The Code of Civil Procedure (§ 2758) provides: "The decree must determine and specify the amount of each debt established as a valid and subsisting debt against the decedent's estate, etc.;" and a "debt" is defined by the Code of Civil Procedure" (§ 2514, subd. 3) as follows: "The word 'debts' includes any claim or demand upon which a judgment for a sum of money or directing the payment of money could be recovered in an action; and the word creditor includes any person having such a claim or demand." In several places in chapter 18, claims which have not matured

are referred to, not as "debts" but always as "debts not yet due."

Mrs. Cook's claim was not due at the date of the first decree; she could not at that time be said to have a "valid and subsisting debt against the decedent's estate"; she could not then have instituted proceedings for the sale of the real estate; she could not have established her claim upon the first hearing. There is no provision anywhere in title 5 of chapter 18, for the proof of a debt not yet due, upon the first hearing, and Mrs. Cook, for that reason, was not bound to present her claim at that time, and laches cannot be attributed to her on account of her failure so to do. In this view of the case, the motions to open the decree should have been denied upon the merits, as unnecessary and superfluous.

Under the Revised Statutes (§§ 37, 38, 39, 43, 71, and 73) claims proven upon the second hearing stood upon an equal footing with those established by the first decree, and there was no preference or priority of payment, as between debts of the same class. But by the Code of Civil Procedure a radical change was introduced, and under the present law there can be no doubt that those claims which were established by the first decree are entitled to priority of payment over those proved upon the hearing for distribution, unless there exists a single exception, in favor of a "debt not yet due."

The serious question in this case, therefore, arises upon the construction of subd. 7 of § 2793 of the Code of Civil Procedure, which reads as follows:

"Out of the remainder of the money must be paid,

in full, the other debts, which were established and recited in the first decree, and were not rejected upon the second hearing; or if there is not enough for that purpose, they, or so much thereof as the money applicable thereto will pay, must be paid in the order prescribed by law for payment of a decedent's debts by an executor or administrator out of the personal assets, without giving preference to rents, or to a specialty or to any demand on account of an action pending thereupon; and paying debts not yet due, upon a rebate of legal interest."

The section is ambiguous and is inartificially drawn, and at the first glance there would seem to be doubt as to its true construction and meaning; but upon a careful examination of the section in connection with the revisers' notes and the former statute, we are convinced that the true meaning and intent will be better arrived at by transposing the words after the second semicolon ("and paying debts not yet due, etc.") to a position immediately after the words "second hearing," before the first semicolon, thus placing debts not yet due upon the same footing with those established by the first decree. This is the only construction that gives the subdivision an intelligible meaning, and the last clause of the subdivision would be utterly meaningless under any other construction that has been suggested.

If the legislature had intended that a debt not yet due should be postponed to one which was due, they would have provided for its payment in subd. 8; but it appears that the only provision anywhere in the whole title for proving or for paying a debt, not yet

due is contained in subd. 7, and provision for its payment being made there, and there only, the conclusion is irresistible that it is to be paid with the other debts provided for in that subdivision. We believe too that this construction will tend to do substantial justice in all cases. Under the construction contended for by the counsel for the executor, creditors whose claims are not due at the death of a decedent will be entirely at the mercy of the executors or administrators, who, through favoritism or from enmity, could so institute and conduct the proceedings as to unjustly and unfairly discriminate between creditors whose claims are equally just and equally entitled to payment.

There is no reason why, in justness and fairness, a claim against a decedent's estate, which is due, should be preferred to another which is not due, and such is not the policy of the law. This is emphatically indicated by the provisions of the Code (§ 2745), with reference to the payment of a claim not yet due upon the judicial settlement of the accounts of an executor or administrator. Ample provision is here made for the protection of a creditor whose claim is not due, upon the same basis as one which is due, and while this is not controlling in this case, yet it is a strong indication that the legislature regarded the two classes of claims as equally entitled to payment.

We are strongly re-inforced in our opinion by the notes of the revisers. Section 38 of the R. S. provided for the payment of all the decedent's debts in full, or, in case of a deficiency of assets, in proportion to their respective amounts. Section 39 provides

that a creditor whose debt is not yet due shall receive his proportion with other creditors upon a rebate of legal interest, substantially the same as the last clause of subd. 7 of § 2793.

The revisers say: "Subdivision 7 has been taken from §§ 38, 39 and 73 of the R. S. *without material change*, except by the addition of the words which connect the provision with subdivision 8, and by the insertion of the provision with reference to the order of payment among creditors." From this language the fair inference is that there was no intention to change the *status* of a debt not yet due.

The revisers further say: "Subdivision 8 is new. It applies to creditors who come in after a sale as provided in § 2788. The regulation which it introduces appears to rest upon plain principles of justice, especially in view of the amendments to the preceding sections, giving to any creditor the right to institute original proceedings: of his right which the amendments preserve to come in at any time before decree when proceedings have been instituted by another creditor: of the great publicity required at every step before the decree: and of the embarrassments which will result from the debts subsequently proved, if there is any deficiency. Under such circumstances creditors who neglect to come in until after the decree should be postponed even when no other property remains, to those who have been diligent to prove their debts in season, and have perhaps borne the expense and labor of the proceedings."

None of this reasoning is applicable to the case before us. As we have seen, Mrs. Cook was not, at

the date of the first decree a "creditor" and her claim was not then a "debt" within the meaning of the statute, and she could not thus have established it. It cannot, therefore, be said that she was guilty of laches in not then attempting to establish it. After a troublesome and expensive litigation, she has had the justice of her claim established by law; she has not neglected any proper or necessary step to bring her claim to the attention of the court; and now for the first time she has an opportunity to prove and establish it in this proceeding. Every consideration of justice and equity, and we believe, the plain language and direction of the statute itself, require that she should now be placed upon an equality with the other creditors. The order of distribution will be made accordingly, and the claim of Rosina Cook (exclusive of costs) be paid *pro rata*, and in proportion to its amount with the other creditors.

Upon this accounting, we are asked by the executor, against the objection of Mrs. Cook's counsel, to allow out of the proceeds of the sale of the real estate, his expenses in defending the suit of Mrs. Cook amounting to about \$600.00, as well as her costs and disbursements in defending the Wilcox action for dower and an accounting, amounting to \$822.30. In addition to the reasons heretofore stated for disallowing costs in the Wilcox case, we decline to do so for the additional reason that there is no provision of law which justifies or provides for their payment out of this fund. Independent of any question as to the necessity or propriety of the large expenditure of the executor in litigations, it may be seriously doubted

whether, under any circumstances, these expenses could be charged upon the real estate, or provision made for their payment out of its proceeds. The law makes no provision for the sale of real estate to pay costs of litigations or the expenses of administration; on the contrary, it provides that the real estate of a decedent cannot be sold by the executor or administrator except for the payment of his debts and funeral expenses (Code, § 2749). Even where a judgment is obtained against an executor upon a disputed claim, the costs in such a judgment cannot be paid from the proceeds of the real estate (§ 2757). In short, the policy of the law seems to be to carefully guard against the payment, from the proceeds of the real estate, of any claim or demand except a debt owing by the decedent at the time of his death, his necessary funeral expenses, and the actual expense of the proceeding for the sale of the real estate. Were this not so, the Code would not have restricted the claims for which land must be sold to the payment of the decedent's debts and funeral expenses, but would have permitted the executor or administrator to sell the lands for any claims which he might have, arising from expenses incurred by him in the administration of the estate. The language of subd. 7 of § 2793 is imperative as to the class of debts which may be paid under its provisions. It says: "out of the remainder of the money, must be paid in full, the other debts, which were established and recited in the first decree, and were not rejected upon the second hearing," thus devoting the fund to the payment of certain specific

debts and preventing its diversion for any other purpose whatever.

It would be a useless expense, many times, for a creditor to prove his claim in such a proceeding if the statute did not afterwards protect his debt against the claims of executors for expenses incurred, either before or after he is cited to establish his debt in court. The decree of the Surrogate upon the first hearing becomes in fact a lien upon the proceeds of the sale of land, and thus secures payment of the debts established on the first hearing, if sufficient for that purpose, against any contingency. No mortgage or judgment could make it more secure than this decree of the court, against the subsequent acts of executors, or against those creditors who neglected to establish their debts when invited by the court to do so. The law has wisely appropriated this fund to the payment of those debts which the decedent created in his lifetime, and in our judgment we have no authority to use it for any other purpose. Nor is it any hardship upon, or injustice to an executor thus to hold the law to be, for before he prosecutes or defends an action, or subjects an estate to any expense beyond that for which the law has made provision, he has ample opportunity to ascertain the exact amount of the assets of the personal estate, and then to determine what his course shall be. In plain and unmistakable language, the law has said to him that the real estate of a decedent cannot be sold for any other purposes than those we have stated, and we know of no reason why he should not act accordingly. Had all the expenses which this executor has incurred in his litigations existed be-

MATTER OF POTTER.

fore any proceedings were taken to sell the land for the payment of debts, he would then have been compelled to see the land of the decedent ordered sold for the payment of debts existing at the death of Mr. Wilcox, for he could not have proved his claim in that proceeding, nor made use of it to institute measures for the sale of the decedent's land to procure its payment, so that, at no stage of his administration, has it been in the power of the court to aid him in the collection of his disbursements in the litigations in which he has been engaged out of the real estate or its proceeds, and his application to be repaid in this manner for this class of expenses must therefore be denied. It may be claimed that, under the provisions of subd. 5 of § 2793, these expenses may be allowed as against the real estate, but in our opinion this provision is only intended to cover payments made by an executor or administrator on account of debts of the decedent and funeral expenses.

* * * * *

ALLEGANY COUNTY.—HON. C. A. FARNUM, SURROGATE.—May, 1887.

MATTER OF POTTER.

*In the matter of the estate of CLARK L. POTTER,
deceased.*

Decedent, at the time of his death, was a member of a firm, which was then insolvent and indebted to L. in the amount of a promissory note,

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whereon the latter brought action against the administrators and, having shown the insolvency of the surviving partners, recovered a judgment in the ordinary form, with a direction added, that the same "be paid and collected out of the property of the estate of" decedent. The judgment creditor, upon the settlement of the administrators' account, claiming title to equality, in respect of payment, with the individual creditors,—

Held, that the judgment did not purport to adjust the equities of the various creditors, but simply established the right of L. to payment out of decedent's estate; and that the individual creditors should first be satisfied, and thereafter the balance of assets be distributed among the creditors of decedent's firm, including L.

Matter of Gray, 42 Hun, 411—distinguished.

MARSHALLING of assets upon judicial settlement of account of administrators of decedent's estate.

RUFUS SCOTT, *for administrators*.

JAMES H. STEVENS, *for Lucy L. Potter and Harriet Wilbur, creditors*.

THE SURROGATE.—Of this estate, there are not sufficient funds to pay the individual debts of the decedent. Here there are two classes of creditors, namely, those having claims against Clark L. Potter alone, and those against the firm of Potter Brothers, of which firm Clark L. Potter was a partner at the time of his death. The claims presented and proven, which were owing by the firm of Potter Brothers, far exceed the others, and if these be allowed and paid from the decedent's estate, the individual creditors will receive but a small portion of their due. The firm of Potter Brothers, at the time of the death of Clark L. Potter, was insolvent.

"It is a settled rule of equity, that in marshalling the assets of a deceased partner, the partnership property is to be first applied to the payment of partnership debts, and that until such debts are all paid, no creditor of the individual partner is entitled to any

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share in the assets of the partnership. Also that the separate creditors of the deceased partner are entitled to priority over the creditors of the partnership, in respect to the separate estate of the deceased partner" (Kirby v. Carpenter, 7 *Barb.*, 373, 378). See, also, Ganson v. Lathrop (25 *Barb.*, 455); Parsons on Partnership, 448; Story on Partnership, § 363; 3 Kent, 64, 65.

Counsel for Lucy L. Potter insists that her claim, for upwards of \$2,300, should be entitled to a distributive share of this estate, upon an equality with those holding claims against Clark L. Potter, individually. An examination of the judgment roll, in the action, in the Supreme court, of Lucy L. Potter against these administrators, shows that the action was based upon the note given by Potter Brothers October 31st, 1878; the plaintiff made a case entitling her to recover, for she was unable to obtain satisfaction from the surviving partners composing the firm of Potter Brothers. Her claim was one against the partnership, and should be paid from partnership funds if possible. Failing to obtain payment from the surviving members of the firm, she became entitled to have her claim paid from the estate of the decedent, and the judgment obtained gives her that right, yet the judgment does not put her claim on an equality with those having claims against Clark L. Potter individually. The judgment is the ordinary judgment for money, with the additional clause therein—"and it is further decreed that said sum be paid and collected out of the property of the estate of said Clark L. Potter, deceased."

This judgment does not purport to adjust the equi-

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ties of the various creditors of the estate of Clark L. Potter, but simply establishes the right of Lucy L. Potter to be paid the amount of her judgment from the estate of Clark L. Potter. It does not change or seek to change the well established rule, above cited, that the separate creditors of a deceased partner are entitled to priority over the creditors of the partnership in respect to the separate estate of the deceased partner. By recovering judgment against the administrators, the nature of the claim is not changed. Counsel cites Matter of Gray (42 *Hun*, 411; rev'g 4 *Dem.*, 515) as an authority requiring the judgment claim of Lucy L. Potter to be paid *pro rata* with those holding claims against Clark L. Potter, individually. There is a marked difference in the two cases: In the Gray case, the referee reported that all of a certain claim in controversy was entitled to share equally in the distribution of the decedent's estate with his individual creditors, and judgment was duly entered in accordance with such report. The General Term held that such judgment was binding upon the Surrogate's court, Justice PRATT dissenting. In the case at bar, the judgment only determines that Lucy L. Potter has a claim against the estate of Clark L. Potter, to be paid in due course of administration. By first paying those holding claims against Clark L. Potter individually, and thereafter paying the judgment claim, we do no violence to the judgment, and only follow the rule settled by a long line of decisions.

The decree to be entered herein will provide for the payment of the individual creditors of Clark L. Potter in full, should there be sufficient assets, and, if

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not sufficient assets, that they be paid *pro rata*; should there be funds after the payment of such claims, the balance to be distributed *pro rata* among the firm creditors of Potter Brothers who have proven their claims upon this accounting, including the judgment claim of Lucy L. Potter.

CHAUTAUQUA COUNTY.—HON. DANIEL SHERMAN,
SURROGATE.—April, 1887.

MATTER OF DORMAN.

In the matter of the application for probate of a paper propounded as the will of DEARING DORMAN, deceased.

Decedent, who was one of the first settlers in the town of Sherman, Chautauqua county, with the aid of his twelve children by his first wife, cleared up and paid for a valuable farm of 359 acres. Two years after her death in 1866, and when of the age of 71 years, he married his second wife, by whom he had no children, and to whom, by his will executed in 1876, he gave all his property. He died in 1884, aged 87 years. Soon after his marriage to his second wife, he took great apparent dislike to his children, and, during several years before making his will and until his death, he habitually, without apparent cause, denounced them as robbers and thieves, and declared that not one of them should have any of his property; at such times manifesting great excitement and refusing to be reasoned with on the subject. He was naturally of a nervous temperament, positive in his opinions and emphatic in his manner of expressing them; on other subjects than his children, his manner and conversation were usually mild and reasonable, and in matters not relating to them he was rational and transacted business with good judgment and discretion. Upon application for probate of his will,—

Held, that the decedent, at the time of making the same was a monoma-

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niac, acting under the insane delusion that his children were his enemies conspiring to rob him of his property, leading him to disown them as his children, and to disinherit them from any share in his property which they had assisted him in accumulating; and, such tendency and delusion having been aggravated by the undue influence of the beneficiary, that the application should be denied.

APPLICATION for probate of will. The facts are stated in the opinion.

H. C. KINGSBURY, *for proponent.*

JOHN S. LAMBERT, *for contestants.*

THE SURROGATE.—Dearing Dorman died Nov. 29th, 1884, aged 87 years, leaving him surviving Mary E. Dorman, widow by his second marriage, six sons, five daughters and two minor grandchildren of his youngest deceased son, being his heirs at law by his first wife who died intestate in 1866. He had no children by his second wife. Mr. Dorman was one of the pioneer settlers of the town of Sherman, and was an industrious, frugal and prosperous farmer. He purchased, cleared and paid for a farm of 359 acres which, at the decease of his first wife, with whom he had lived happily, was well stocked with cows and other cattle. His sons had assisted him in clearing up the farm, and his daughters in the household work.

Soon after his marriage in 1868, to his second wife, whose maiden name was Mary E. Horton, the deceased gave to his son Albert, who had married her sister, an improved and valuable farm of 116 acres in Sherman, reserving the right to cut his fuel thereon during life. This was the only advancement he made to any of his children.

Nearly eight years previously to his death, and

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when of the age of 79 years, he made his alleged will, offered for probate, dated October 30th, 1876, by which he devised all his estate, real and personal, of the value of about \$7,000, to his wife, Mary E. Dorman, by his second marriage, and appointed her executrix.

His youngest daughter, Adelaine, a girl in poor health and without pecuniary means, kept house for him from the death of his first wife until after his second marriage. None of his children lived in his family after Adelaine left; his household afterwards consisting of himself and the beneficiary, who had one daughter by a former husband. The cause of Adelaine's leaving home was some trouble with her step mother, and her father's unwillingness for her to remain. His children lived with him, working on the farm until of age, and some of them several years afterwards.

He claimed that his children were opposed to the second marriage, and after the death of his first wife in 1868, and before making his will in 1876, there was apparently a very marked change in his feelings towards all his children except Albert, and against him at times, so much so as to lead him to denounce them, in the public streets, stores and shops of the village where he lived, as robbers and thieves, usually introducing the subject himself, stating that he had no children, that they were all trying to rob him, which statements were untrue in fact; also stating that not one of them should ever have a cent of his property. On these occasions, extending through several years before and after making his will, his manner was

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violent, his denunciations of all his children unsparing, numerous witnesses testifying that the expression of his eyes on these occasions was wild, his face flushed, and that his whole demeanor showed great nervous excitement, and that this tendency increased with his age. When speaking upon other subjects than his children, his manner and conversation were usually mild and reasonable, and in matters not relating to them he was rational, and transacted business with good judgment and discretion. He was a man of naturally nervous temperament, quite positive in his opinions, earnest and emphatic in his manner of expressing them.

Immediately previously to making his will, he expressed his intention of deeding his property to his wife, so that his children should not have any of it, and on the day the will was made he went to an attorney's office, unaccompanied by his wife, with the intention of conveying his property to her by deed, but being then advised not to allow his property to pass from his control during life, he instead executed the will in question; and afterwards, on the same day, called a neighbor into his house, when Mrs. Dorman, the beneficiary, commenced the conversation by saying: "We have got them devils fixed," referring to the will and her husband's children; to which the testator replied: "Yes I have willed every thing I have got to that woman who sits there," referring to the beneficiary.

On the occasions mentioned, before and after making his will, when denouncing his children as robbers and thieves, and as trying to rob him, and declaring

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that they were not his children, when told by his neighbors and friends that his children were not robbers and thieves, that they were his children, and were not trying to rob him of his property, he usually refused to be reasoned with upon the subject, and growing excited and boisterous, denounced them more and more.

Some years before making his will, he purchased a house and lot in the village of Sherman, and moved there and resided until his death, renting his farm to others. He had some litigation with his son, Archibald, in 1870, and in 1879 with Albert, to whom he had given a farm, these sons in each case commencing the actions and not succeeding in either. This litigation with Archibald in 1870 might be a reason for disowning and denouncing him, but not for his continued and indiscriminate denunciation of his five daughters and other sons with whom he had had no personal difficulties.

I find from the evidence that Dearing Dorman at the time this will was made, October 30th, 1876, was not of sound and disposing mind; that he was a monomaniac on the subject of his children; that he had the insane delusion that they were his enemies and were combined against him to rob him of his property, leading him to disown them as his children and to disinherit them from any share in his property which they had assisted him in accumulating; and that such tendency and delusion were aggravated by the undue influence of the stepmother of his children.

That a man laboring under such delusion is incompetent to make a will relating to the subject of his

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delusion and affected by it, although rational and competent to transact business upon other subjects, is a well established principle of law, sustained by numerous authorities (Matter of Shaw's will, 2 *Redf.*, 107; Lathrop v. Borden, 5 *Hun*, 560; Stanton v. Wetherwax, 16 *Barb.*, 259; Seaman's Friend society v. Hopper, 33 *N. Y.*, 619; Morse v. Scott, 4 *Dem.*, 507; *In re McCue*, 17 *Week. Dig.*, 501; Riggs. v. Am. Tract Soc., 95 *N. Y.*, 503).

I, therefore, dismiss the proceeding for its probate.

CHAUTAUQUA COUNTY.—HON. DANIEL SHERMAN,
SUBROGATE.—May, 1887.

MATTER OF THOMPSON.

*In the matter of the judicial settlement of the account
of the executors of the will of MELVIN THOMPSON,
deceased.*

Testator died in 1875, leaving a farm worth \$8,000, incumbered by mortgages for \$4,600, and personal property consisting mostly of cattle and farming implements, worth \$2,000. A widow, and twelve children, eight of whom were minors, survived him. The will gave all the property to the widow for life, and, at her death, to the children in equal shares, except that two adult sons, who were appointed executors, were to "receive out of his estate a just and reasonable compensation for their labor and services, and for redeeming said estate from the mortgages with which it was incumbered." The executors, upon probate of the will, took possession of the farm and property thereon, made an inventory, and, with the aid of the widow, worked the farm, keeping the family together, paid the mortgage interest and \$1,500 of the principal, and supported and educated the minor children, until the widow's death in 1883,—without objection on the part of the other beneficiaries.

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The executors kept an itemized account of their receipts and disbursements during the eight years of their stewardship. Upon their accounting, four of the children contended that the executors should be paid for their services and reimbursed for their payments exclusively from the estate of the widow. Parol evidence was offered, of declarations by testator, contemporaneous with the making of the will, of a desire that the executors should adopt the course which they had pursued, and be paid and reimbursed out of his estate.—*Held*,

1. That the Surrogate had jurisdiction to construe the will, as an incident to his power to settle the estate and decree distribution.
2. That the parol evidence offered was competent to show testator's intent, upon the point at issue.
3. That the executors were entitled to payment out of testator's estate for their services and expenditures.

As to whether the other adult beneficiaries, being aware of the construction given to the will by the executors, and not objecting to their acts during the eight years of their service, were estopped from thereafter contending for a different construction—*quære*.

CONSTRUCTION of will in proceedings for judicial settlement of executors' account.

A. C. PICKARD, *for executors*.

C. F. CHAPMAN, *for Abram M. Thompson and Emma A. Thompson*.

S. P. FOX, *special guardian*.

THE SURROGATE.—Two questions are raised by the objectors in this proceeding: 1st, Has the Surrogate jurisdiction, as an incident to the judicial settlement of the accounts of the executors, to give construction to the third clause of the will of the testator; 2nd, Does this will authorize payment to Quincy M. and Hiram A. Thompson, executors, for their labor and services since the death of the testator, in support of his family and in carrying on the farm and in paying off mortgages thereon?

The facts appearing from the evidence are briefly stated. Melvin Thompson died at the town of Ellery, March 17th, 1875, owning a farm of 290 acres, of the

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value of \$8,000, and personal property consisting mostly of cows, stock and farming implements, of the value of \$2,000, and owing no debts of any amount, except two mortgages upon the farm, one for \$3,100, and the other for \$1,500, drawing interest at 7 per cent. The testator left, at his death, his widow Priscilla D. Thompson and 12 children by her, of whom, Hiram, Quincy, Abram and Mary were of age. His other eight children were minors, of whom five were girls and 3 boys, the youngest being, at the death of their father, only six years old. The two youngest, Elmer, now aged 20 years, and Sarah, aged 18, appear herein by S. P. Fox, their special guardian. During over two years preceding his death, he had been in poor and failing health, under treatment of a physician at different times, was of the age of 60 years at the time he made his will, December 5th 1874, and was evidently of the belief that he had not long to live, and died in less than four months thereafter.

By the second clause of his will, he gave to his wife the use of his real and personal property during her life. By the third clause of his will (of which construction is asked) he devised to his 12 children, at the death of his wife, his property real and personal, to be equally divided between them, share and share alike, except that his sons Quincy M. and Hiram A. (his executors) should receive out of his estate a just and reasonable compensation for their labor and services, and for redeeming said estate from the mortgages with which it was encumbered.—By the fourth clause, he appointed his sons Hiram A., and Quincy M. Thompson his executors, with power to compromise

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any claim that might exist either against or in favor of his estate.

The attorney who drafted this will and was witness thereto testified, under objection, that, at the time he went there to draft the will, the testator went on and stated the situation of things, the condition of his property and family, and then stated how he wanted his will made, mentioned the number of his minor children and his wife, said that he was more solicitous about them than the others who were then of age, and that this could be better secured by Hiram and Quincy staying there and carrying on the farm with her and the minor children, than by their going away; and that upon his death he wanted Hiram and Quincy to stay there on the farm and if they did so, he wanted them paid out of the estate for so doing, and that Mrs. Thompson and all the members of his family were in and out of the room while the will was being drawn. This testimony is not contradicted. I find that this testimony, being concurrent with the making of the will, was competent in aid of its construction, in showing the intention of the testator.

The executors went into possession of the farm, cows, stock, and farming implements thereon, upon the probate of the will on March 25th, 1875, made an inventory of the personal property of the decedent, and with the assistance of their mother, widow of decedent, worked and carried on the farm, keeping the family together, clothing and educating the minor children in about the same way their father had done in his life time, from March 25th, 1875, until the death of their mother on June 12th, 1883, being over eight

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years. During this time, they paid off the mortgage of \$1,500 and interest on the farm, and paid the interest annually on the other mortgage of \$3,100, and accruing taxes, annually, on the property, without any objections appearing on the part of the other adult heirs. The executors, during the eight years they so worked the farm, kept an itemized account, from day to day, of their receipts and disbursements in carrying on the farm, and of the products thereof sold by them, and of payments on account of the children and family, and payments of taxes and of principal and interest on the mortgages, and expenses connected with their trust under said will, which account is filed in the Surrogate's office.

It is claimed by the learned counsel for the adult legatees Abram M. and Emma A. Thompson, and by the special guardian of Elmer E. and Sarah, minor children of the testator, that, as the testator by his will gave the use of his property to his widow during her life, whatever claim the executors Hiram and Quincy may have for their labor and services in carrying on the farm and in supporting the minor children, for payments upon the mortgages, etc., were, under the will, intended by the testator to have been wholly paid by the widow from her life interest in the property.

I do not so read the will, as it expressly provides that, upon the death of his wife, his property should be equally divided between his children, share and share alike, "except that his sons Quincy and Hiram should receive *out of his estate* a just and reasonable compensation for their labor and services, and for redeem-

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ing said estate from mortgages with which it is now incumbered," and I find that, by the words "their labor and services," the testator intended labor and services to be performed by the executors in carrying on the farm between his death and the decease of his wife and in paying off the mortgages thereon—an arrangement certainly very beneficial to his estate, and especially so to his widow and minor children, whom he was most solicitous for, and exceptionally beneficial to his two youngest children, who during 8 years of their infancy received most substantial benefits in their support, clothing and education, from the construction of their father's will as understood and acted upon by his executors, but who now object to such construction through their special guardian. Only four of the twelve children of the deceased appear and ask for a construction of the will different from that claimed by the executors.

I find that the testator, by the third clause of his will, intended that his two sons Hiram and Quincy, executors thereof, should remain upon his said farm after his death until the decease of his wife, and by their labor and services assist in carrying it on, and in redeeming the same from the mortgages with which it was incumbered, and that for such labor and services they should be paid a just and reasonable compensation out of his estate.

There is another question to be considered in this case, as to the right and good faith of the adult legatees, to at this late day first object to the construction of this will as claimed by the executors. The evidence shows that such legatees were present at the time the

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will was made, and must have had knowledge of its provisions and of the construction which the executors claimed for it. Are they not estopped now from claiming, for the first time, a different construction, after remaining silent for over eight years, when the executors were expending their labor and services in carrying on the farm, and supporting the minor children, and in paying off the mortgages alike for the benefit of the objectors and of the minor children?

The important question in this proceeding relates to the jurisdiction of the Surrogate's court in giving construction to the will of the testator, incident to the judicial settlement of the accounts of the executors. The Surrogate's court has only such powers as are given it by the statute. It has not general jurisdiction in giving construction to wills. Section 2624 of the Code of Civil Procedure, has, however, enlarged the jurisdiction of the court in the construction of wills on probate. Its authority to give construction to the will of the decedent is claimed under its general powers in the settlement of estates and making distributions to legatees. 2 R. S., 95, § 71, gave to a Surrogate's court the power "to settle and determine all questions concerning any debt, claim, legacy, bequest or distributive share, to whom the same shall be payable and the sum to be paid to each person." Sections 2472, 2481, subd. 11 and § 2743 of the Code of Civil Procedure give to such courts the same if not enlarged powers in the settlement of estates.

The counsel for the objectors cite, as authority against the claimants, *Bevan v. Cooper* (72 *N. Y.*, 317) which held that the Surrogate's court had not

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jurisdiction to determine the question whether certain legacies given by the will in that case were charges upon the real estate. But the court held that that question was not involved in the accounting, and was not necessary to be determined by the Surrogate as incident to the accounting and distribution (*In re Verplank*, 91 *N. Y.*, 439). I find that the Surrogate's court has jurisdiction in this case to pass upon these claims of the executors, as incident to its general powers in the settlement of estates (*Riggs v. Cragg*, 89 *N. Y.*, 479; *Purdy v. Hoyt*, 92 *N. Y.*, 448; *Dubois v. Brown*, 1 *Dem.*, 317; *Matter of Collyer*, 4 *id.*, 24; *Fernbacher v. Fernbacher*, 4 *id.*, 227).

ORANGE COUNTY.—HON. R. C. COLEMAN, SURROGATE.—November, 1886.

MATTER OF DUNN.

In the matter of the estate of MOSES DUNN, deceased.

The rule, prevailing previously to the enactment of Code Civ. Pro., § 758, that, upon the death of one of two joint debtors, the decedent's estate can be held only upon showing inability to collect from the survivor, contemplates the insolvency of the latter. His discharge by virtue of the bar of the statute of limitations is insufficient.

An executor or administrator cannot, by making payments in respect of a claim the remedy upon which is barred by the statute of limitations, bind his decedent's estate, so as to revive the obligation.

Barry v. Lambert, 98 *N. Y.*, 300—distinguished.

WILLIAM L. COLE, claiming to be a creditor of this estate, filed his petition asking that the executors be

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required to account or pay his claim. On the return of the citation, objection was made to this application by the executors that the petitioner was not a creditor, and therefore could not compel an accounting. In the month of August, 1868, Alanson Dunn and Moses Dunn, as copartners in business, purchased of petitioner a stock of goods, and in payment gave a note of which the following is a copy :

"\$2500. Three years after date, for value received, we promise to pay to William L. Cole, or order, twenty-five hundred dollars, with interest payable annually,

Unionville, Aug. 8th, 1868.

Alanson Dunn.

Moses Dunn."

Moses Dunn died January 1st, 1870, leaving a will of which his widow Jane Dunn and Henry A. Wadsworth were the executors. Before his death, one year's interest had been paid on the note. After his death Wadsworth, as executor, paid interest on the note each year, down to 1882, and about \$500 of the principal. In 1886, Cole commenced an action in the Supreme court against Alanson Dunn the surviving maker, who pleaded the statute of limitations, and judgment was rendered against the plaintiff on that ground.

In this proceeding, the executors answered, denying the liability of the estate because of the petitioner's failure to show the want of joint assets or insolvent survivor, and also pleaded the statute of limitations.

B. R. CHAMPION, *for executors.*

C. E. CUDDEBACK, *for petitioners.*

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THE SURROGATE.—This case is not affected by § 758 of the Code of Civil Procedure. The note having been made in 1868, the rights of the parties are to be determined by the law as it existed at the time of the transaction (*Randall v. Sacket*, 77 *N. Y.*, 480). The obligation being joint, upon the death of Moses Dunn, his debt at law was discharged, and his estate was only liable in equity, and not in equity unless the petitioner is unable to collect the debt from the survivor (*Pope v. Cole*, 55 *N. Y.*, 124; *Hauck v. Craighead*, 67 *N. Y.*, 432). The petitioner must not only be unable to collect the debt of the survivor, but must be unable to do so because of want of property.

In this case, the question of solvency of the survivor is not mooted, but it appears that the petitioner in these proceedings, in an action brought by him, in 1886, nearly sixteen years after the death of the testator, against the survivor upon the note, was defeated by the statute of limitations, and is thus unable to collect the note of the survivor. The estate of the deceased cannot by the laches of the petitioner, be made to suffer the loss of its right to have the note collected from the survivor, not even if the survivor be now insolvent (*Bloodgood v. Bruen*, 8 *N. Y.*, 362, 374). And the same principle seems to be held in *Lawrence v. Leake* (2 *Denio*, 585).

If these views are correct, the petition in this case should be dismissed, unless the payments made by the executor have in some way revived or kept alive the obligation against the estate; and it is claimed on behalf of the petitioner that such is the case. I

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think the effect of these payments is determined by the answer to the question whether, at the time of making them, the note was a subsisting obligation against the estate, for while an executor may, by making payments on claims which are at that time valid, create a legitimate inference of an acknowledgment of the claim and promise of payment, so as to keep it out of the statute, he cannot, however, by so doing revive a demand which has once expired, or create a liability where, at the time of making the payments, none existed (*McLaren v. McMartin*, 36 *N. Y.*, 88; *Barry v. Lambert*, 98 *N. Y.*, 300, 308).

The counsel for the petitioner refers to the case of *Barry v. Lambert* as sustaining his position, but, as I read that case, the admissions made by the executrix were held to be only an acknowledgment of the validity of a subsisting claim, and the proof of such admissions established a claim which otherwise could not have been proved. The obligation as to the estate was discharged at law by the death of the testator, and the petitioner has never established a liability in equity. The executor could not, therefore, make a valid acknowledgment or promise of payment of the debts.

I, therefore, direct an order to be made, dismissing these proceedings.

MATTER OF BEAKES.

ORANGE COUNTY.—HON. R. C. COLEMAN, SURROGATE.—December, 1886.

MATTER OF BEAKES.

In the matter of the estate of HENRY S. BEAKES, deceased.

A resignation of the office of executor is not subject to retraction.

The selection of an administrator, *c. t. a.*, *d. b. n.*, is to be made with reference to the portion of the decedent's estate left unadministered.

Testator, by his will, after bequeathing several legacies, directed the executors to convert the rest of the estate into money, and divide it into four equal parts, one of which he gave to them in trust for the benefit of successive life tenants ; with remainders over. The first life tenant having died, and the office of executor being vacant, the occasion arose for the appointment of an administrator, *c. t. a.*, to execute the trust.—

Held, that all the persons immediately and ultimately interested in the fund were to be classed together as "principal or specific legatees," within the meaning of Code Civ. Pro., § 2643, subd. 2, and that the Surrogate had a discretion to select from their number, having regard to the nature of their respective interests.

APPLICATION for letters of administration with the will of decedent annexed.

Decedent died in 1869, leaving a will which was subsequently proved, and of which Alexander Wright, David C. Winfield, and Charles C. McQuoid were appointed and qualified as executors. Mr. Wright shortly thereafter, on his own application to the Supreme court, by consent resigned and was discharged. Subsequently the other executors died.

The testator by his will, after giving several legacies, directed his executors to convert the balance of his estate into money, and divide it into four equal

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parts, one of which parts he gave to his executors in trust for the benefit of his son, William, for life, and, at his death, to divide the same into two equal portions, and pay the interest on one of said portions to Laura G. Beakes, who is now Mrs. Foote, the daughter of his said son, during her life, and at her death to pay the principal thereof to her children who shall survive her, and, if she has no children living at her death, then to pay the same to the testator's three daughters, Mrs. Wright, Mrs. McQuoid, and Mrs. Winfield; and to pay the interest on the other portion to Harry S. Beakes, the son of the said William, during the life of the said Harry, and, at his death, to pay the principal thereof to his children who shall survive him, and, if he leave no children surviving him, then to pay the same to the testator's said three daughters.

William Beakes, the son, died leaving his daughter, Mrs. Foote, and his son, Harry S. Beakes, who were both still living. Mrs. Foote was married, and had one son, George W. Foote, a minor living. Harry S. Beakes had never been married.

These proceedings were commenced by the filing of a petition by Mrs. Foote asking the appointment of one John K. Halstead as administrator with the will annexed. Upon the return of the citation, Mrs. McQuoid, Mrs. Wright and Mrs. Winfield opposed and asked to be appointed, and also filed what purported to be a retraction by Mr. Wright of his resignation. Thereupon John K. Halstead, as general guardian of George W. Foote, filed a petition for his appointment in the right of his ward. Henry S. Beakes was represented in the proceedings by the attorneys of his

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sister Mrs. Foote, and desired Mr. Halstead's appointment.

WADSWORTH & GOTT, *for Mrs. Foote, Mr. Halstead and Harry S. Beakes.*

C. G. DILL, *for Mrs. McQuoid and sisters.*

THE SURROGATE.—The executor, Wright, having once entered upon the discharge of his duties, as executor, and having afterwards, on application to the Supreme court, been permitted to resign, and by the court, discharged from his duties, cannot, under § 2639, of the Code of Civil Procedure, retract that resignation (*Matter of Suarez*, 3 *Dem.*, 164). The application of Mrs. Foote for the appointment of John K. Halstead, a stranger to the estate, cannot prevail against the application of Mrs. McQuoid, Mrs. Winfield and Mrs. Wright, who are legatees.

The right to the administration is now controlled by § 2643 of the Code of Civil Procedure. The portion of the estate, left unadministered by the deceased executor, is that part of the residue of his estate, which was given the executors in trust for the purposes specified in the will; and those ultimately entitled to receive it do not take as residuary legatees, but rather as remaindermen, or general legatees. All the persons interested in the fund are, therefore, to be classed together under the second subdivision of the section, which directs the issuance of letters "to the principal or specific legatees" who are qualified to act as administrators (*See Quintard v. Morgan*, 4 *Dem.*, 168). Harry S. Beakes lives in a remote state, and does not desire the appointment. George W. Foote being a minor, his guardian cannot take as

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against the adult legatees (*Cottle v. Vanderheyden*, 11 *Abb.*, *N. S.*, 17; *Estate of Morgan*, 8 *Civ. Pro. R.*, 77; *s. c.* *Quintard v. Morgan*, *supra*).

The interests of Mrs. McQuoid, Mrs. Winfield and Mrs. Wright in the fund are very remote. They are ladies well advanced in life, and whether they shall ever be entitled to share in the fund depends not only upon the contingency of Mrs. Foot and Harry S. Beakes, or either of them, dying without leaving living issue, but upon their surviving the happening of this contingency upon which their interests depend (*Hulse v. Reeves*, 3 *Dem.*, 486; *aff'd*, Ct. App., Oct., 1886).

Mrs. Foote alone remains to be considered. She has a vested life interest in one half of the fund, and would, therefore, seem to have the highest claim to the appointment. Therefore, exercising the discretion belonging to the court, which of several persons to designate, I direct that letters issue to Mrs. Foote, if she desires to act, and, if not, then to Mrs. McQuoid, Mrs. Winfield and Mrs. Wright. If Mrs. Foote desires to associate Mr. Halstead with her, she may do so (*Quintard v. Morgan*, *supra*).

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ORANGE COUNTY.—HON. R. C. COLEMAN, SURROGATE.—March, 1887.

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In the matter of the estate of MARY E. MILLER, deceased.

Legacies to descendants of brothers or sisters of a testator are taxable under the collateral inheritance tax act, L. 1885, ch. 483.

So are legacies, to persons not exempt, of less than five hundred dollars;—the proviso “that an estate which may be valued at a less sum than five hundred dollars shall not be subject to said duty or tax” referring to the estate of the decedent, and not to the interest of a legatee or other taker.

In determining what “societies, corporations and institutions” are “exempted by law from taxation,” within the meaning of the act cited, the rule, that statutes of exemption are to be strictly construed, does not require that only such societies be deemed exempt as are declared so to be by their charters; it is enough if the society claiming the immunity belong to a class exempted by general statute.

ASSESSMENT of collateral tax upon legacies bequeathed by decedent's will. The facts appear sufficiently in the opinion.

E. A. BREWSTER, *for legatee, J. B. Miller.*

SCOTT & HIRSCHBERGH, *for Home, Hospital and Church.*

THE SURROGATE.—John H. Miller is a nephew of the deceased, and it is claimed, on his behalf, that the legacy and devise to him come within the excepted classes, he being a lineal descendant of a brother of the decedent.

* Affirmed at July Gen. Term, 2d Department.

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The persons excepted from taxation are: "father, mother, husband, wife, children, brother and sister and lineal descendants born in lawful wedlock, and the wife or widow of a son and the husband of a daughter, and the societies, corporations and institutions now exempt from taxation." It is urged that the words, "lineal descendants," etc., refer to brother and sister, they being the immediate antecedents; that the punctuation by commas groups these words "with brother and sister," so that the best grammatical construction makes them to relate to "brother and sister;" and that these words cannot refer to the decedent, because "children" (which word has been held to include grandchildren) have already been mentioned.

We do not have to read far in this act, before we see that it is most inaccurately and obscurely drawn. By referring to the second section, where the excepted classes are undertaken to be again enumerated, we find "the husband of a daughter" entirely omitted, and the words, "lineal descendants" following "the widow of a son" separated only by a comma. And, again, in the ninth section, "children" and "lineal descendants" are entirely omitted. A strict and grammatical construction, which will harmonize all the sections, cannot be adopted. We must rather seek for the general purpose and intent of the act, without reference to the strict rules of grammar. When the application of grammatical rules gives a forced and unreasonable construction, and imparts a meaning contrary to the evident general purpose and

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scope of an act, the common and obvious sense, rather than the grammatical sense, should be followed.

The evident intent of this act is to tax all legacies not given to persons who are either very nearly related to, or who might have been dependent on the decedent. A grandfather, grandmother and cousins are not excepted, nor a grandchild, either, unless we find that the words, "lineal descendants" refer to the decedent, for the cases in which the courts have held the word "children" to include more remote descendants are cases where the courts were able to gather from a will such an intent. I doubt if such a construction has ever been given a statute.

The tax is imposed by the first section, and there only can we ascertain who are to be taxed. It is only proper to look to the other sections to seek the mind of the legislature. By so doing, we see, by the arrangement of the words "lineal descendants," in the second section, that they did not intend these words to relate to "brother and sister" alone, but either to the descendant, or to all the preceding classes. The effect of holding that descendants of brothers and sisters are intended to be excepted would be to exempt those descendants to the remotest generation,—in other words, make a more favorable provision for them in this matter than the law makes for them in the distribution of estates. I cannot suppose the legislature so intended.

While it is a rule of construction that words of relative meaning usually refer to the immediate antecedent, that is not always the case. Sometimes the antecedent, is understood. The words, "father,"

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“mother,” down to and including “brother and sister and lineal descendants,” etc., are all used as relative words or clauses, the antecedent not being expressed but understood,—so that if we supply what is plainly intended after each word or clause, which is punctuated off by commas, we have: “father of the decedent,” “mother of the decedent,” “brother and sister and lineal descendants born in lawful wedlock of the decedent,” etc., etc. This seems to me to be the correct construction, and gives a meaning which harmonizes with the general purposes of the act. I am, therefore, of the opinion that legacies to descendants of brothers and sisters are taxable.

The testatrix has given several legacies of five hundred dollars, and of less amounts; and it is claimed, on behalf of these legatees, that such legacies are exempted by the last clause of the first section of that act, which reads as follows: “Provided that an estate, which may be valued at a less sum than five hundred dollars shall not be subject to said duty or tax.” Estates as an entirety, have not been mentioned in the preceding part of the act, but rather, gifts, grants, legacies, etc., yet the word, “estate” seems to be used in the ordinary and general sense, and is used to exempt the estates of decedents, whose whole estate does not exceed \$500, rather than in the limited sense so as to exempt all gifts, grants, legacies, etc., which do not amount to \$500. This meaning of the word “estate” is somewhat supported by the phraseology of the preceding part of the section, where the rate of the taxation is fixed. It reads: “Subject to a tax of five dollars on every

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hundred dollars of the clear market value of such property, and at and after the same rate for any less amount." The words "for any less amount" probably refer to fractional parts of a hundred dollars; but I do not think that is the only meaning to be given them.

The testatrix, by her will, gives a legacy of \$4,000 to the home for the friendless in Newburgh, another to the Saint Thomas church of New Windsor, of \$5,000, and another to the St. Luke's home and hospital, of Newburgh, of \$2,000. These legacies, it is claimed, are exempt from the tax imposed by this act, as coming within the excepted "societies, corporations and institutions, now exempt by law from taxation." The home for the friendless is a corporation organized under the act passed April 7th, 1862, and its object is declared to be "by the publication and diffusion of books, papers and tracts, and by other moral and religious means, to prevent vice and moral degradation, and maintain houses of industry and homes for the relief of friendless, destitute, or unprotected females and for friendless and unprotected children." The act does not contain any provision exempting its property from taxation. The St. Luke's home and hospital is a corporation organized under the general act for the formation of benevolent and charitable societies (L. 1848, ch. 319). The home and hospital is maintained as an alms house and hospital for the poor, and it is supported entirely by charity. The act does not exempt the property of corporations formed under it from taxation. The St. Thomas church is a religious society, formed under

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the general laws relating to such societies. It is not claimed, for these societies, that they have any other exemption than such as are contained in the general act relating to the taxation of property.

Now, by 1 R. S., 387, § 1, "all lands and all personal estate within this State, whether owned by individuals, or by corporations shall be liable to taxation, subject to the exemptions hereinafter specified. The exemptions are set forth in § 4. In subd. 3 of that section, "every building for public worship" is exempted. Subd. 4 exempts "every poor house, alms house, house of industry, and every house belonging to a company incorporated for the reformation of offenders, or to improve the moral condition of seamen, and the real and personal property used for such purposes, belonging to, or connected with the same." Stocks owned by charitable institutions are also exempted by subd. 6, and by subd. 7 the personal estate of every incorporated company not made liable by the fourth title of the chapter. The fourth title relates to corporations organized for business and other profitable purposes. These seem to be the only statutes relating to the taxation of these societies; and it is from these that it must be determined whether such societies are "now exempted by law from taxation."

While, in considering statutes of exemption, the rule of strict construction must be applied, still, I do not think the rule should be so strictly applied as to require that the societies must be so exempted by their charters; it is sufficient, if it comes under some class exempted by general statute, and I am of

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opinion that, under the statutes above quoted, the home for the friendless and the St. Luke's hospital are societies now exempt from taxation (*People v. Commissioners*, 36 *Hun*, 311), and, therefore, that the legacies to them are not subject to the inheritance tax. As to the St. Thomas church, I am of a different opinion. Its building for public worship is, undoubtedly, exempt from taxation, but there is no such general exemption as to make it a society by law exempt. This legacy should, therefore, be assessed.

ORANGE COUNTY.—HON. R. C. COLEMAN, SURROGATE.—April, 1887.

MATTER OF WINANS.

In the matter of the estate of MARY WINANS, deceased.

Pension moneys given by the United States to a woman, on account of the military services of her son, are not, after her death, exempt, under either Code Civ. Pro., § 1393 or U. S. R. S., § 4747, in favor of her descendants not constituting a family for whom she provided, from liability to be applied to the payment of a judgment recovered, upon a debt of decedent, against her administrator.

DETERMINATION of claim of exemption of pension moneys, upon judicial settlement of administrator's account.

JOHN J. BEATTIE, *for administrator.*

WADSWORTH & GOTT, *for Mrs. Longwell.*

J. MERRITT, *special guardian.*

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THE SURROGATE.—At the time of her death, there was on deposit, to the credit of the deceased, \$1,000 of principal and \$85 interest in the Warwick savings bank, and \$500 in the Warwick national bank. The \$1,000 and the \$500 were pension moneys given her by the United States, no account of the services of her son, and these moneys constituted the whole of her estate. At the time of her death, she was living with her daughter, Sarah E. Longwell, who, since her mother's death, has recovered a judgment against the administrator for about \$900, for the care of the deceased, whose next of kin are children and grandchildren. None of her descendants seem at that time to have composed a family for which she provided. Upon the settlement of the administrator's accounts, it was claimed on behalf of the minors, who are grandchildren of the deceased, by their special guardian, that these moneys are not properly applicable to the payment of Mrs. Longwell's judgment, being exempted by § 1393 of the Code of Civil Procedure and by § 4747 of the U. S. R. S.

A pension is a gratuity from the government, and the government can impose such conditions upon the enjoyment of it by its beneficiaries as it may desire, without doing any injury to the pensioner's creditors, for nothing is being withheld from them, to which they had a right to look for the payment of their debts. It becomes a question, under the laws granting and exempting pensions, what changes in character may be made in money received for pensions without losing its privileged character, and for whom these privileges can be urged.

In *Stockwell v. Nat. Bank of Malone* (36 *Hun*, 583), it was held that, although the pension money had been deposited in a bank, the account could not be reached by a creditor; but it was held otherwise where pay and bounty had been voluntarily exchanged for other property (*Wygant v Smith*, 2 *Lans.*, 185). In *Hodge v. Leaning* (2 *Dem.*, 553), the Surrogate of Otsego held that, even after the pensioner's death her creditor could not reach moneys received by her before her death, so as to take it away from her minor children, resting his decision upon the evident intention of the government to devote pensions to the personal benefit of the soldier, and, upon his death, of his widow or minor children under sixteen years of age. In *Becker v. Becker* (47 *Barb.*, 497), it was held in a case where it was sought to reach property, exempt under the statute, by levy and sale under an execution issued before the death, and levy made thereunder after the death, of the debtor, that such property was still exempt in favor of the debtor's family, and could not be sold away from them for his debts, upon the ground that the legislature made the exemption not only in favor of the debtor, but also of his family. See, also, *Vedder v. Sexton* (46 *Barb.*, 189).

I think it is clear that the privilege of exemption is not made an incident of the thing exempted, but is a privilege personal to an individual or individuals. It has been so held in *Micks v. Tousley* (1 *Cow.*, 114) and *Baker v Brintrall* (52 *Barb.*, 188: s. c. 5 *Abb.*, *N. S.*, 253). But these were cases where the right was sought to be asserted by strangers to the debtor.

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The exemption under § 1393 of the Code of Civil Procedure is not made to depend upon being a householder, as in § 1390, nor, as in § 1391, upon "being a householder or having a family for which he provides," and it perhaps would not carry with it the enlarged privilege in favor of that family. However, as this is not a case in which the exemption is sought in favor of a soldier, or any one dependent upon him, I think the moneys are not exempt under the United States statute. Nor is it a case where the exemption is sought in favor of the pensioner or any member of the family of a deceased pensioner, and such moneys are not exempt, therefore, under the Code of Civil Procedure.

The decree will direct the payment of the judgment.

ORANGE COUNTY.—HON. R. C. COLEMAN, SURROGATE.—April, 1887.

MATTER OF YOUNGS.

In the matter of the disposition of the real property of HENRY YOUNGS, deceased, for the payment of his debts.

It seems that trust money may be followed, not only into land wrongfully purchased therewith by the trustee, but also into land purchased therewith by one to whom the trustee has wrongfully lent it.

In order to impress a trust upon land purchased by one holding money belonging to the trust, the conversion of the trust money into the property sought to be reached must be clearly shown; it is not enough to show possession of trust funds and purchase of the property.

Where trust moneys are deposited in a bank, and the depositor subse-

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quently purchases property with funds drawn from that bank, the *cestui que trust*, seeking to follow the trust moneys into the property purchased, must show that, but for the intermingling of moneys in the bank, the money employed in the purchase would have been the identical trust moneys deposited.

Hence, where, in a special proceeding instituted to procure the disposition of a parcel of real property of decedent, for the payment of his debts, certain incompetent infant *cestuis que trustent* sought to be paid out of the proceeds in preference to other creditors, on the ground that their trustee had unlawfully lent funds of their trust to decedent who had purchased the property in question therewith ; and the evidence showed that, though decedent had borrowed such funds and deposited them in his bank, his account had been overdrawn thereafter and before he drew the amounts which he paid for the property,—
Held, that the preference sought to be secured must be refused.

APPLICATION for the disposition of decedents real property, for the payment of his debts.

Decedent died September 9th, 1885, and his widow, Annie J. Young was duly appointed administratrix. At the time of his death, he was the owner of valuable real estate in New York city, Brooklyn and Orange county, one parcel being a tract of 30 acres in the last named county, known as the Thompson purchase. Even after the sale of the real estate, there would not be sufficient to pay the debts. The other facts appear sufficiently in the opinion.

H. C. DURYEA, *for petitioner, the administratrix.*

G. O. HULSE, *for committee of Henry Y. and Caroline Lewis.*

THE SURROGATE.—Henry Youngs, Sr., the uncle of the decedent, and Mrs. Caroline Lewis, were the executor and executrix of Charles G. Ferris, deceased, the father of Mrs. Lewis. Henry Youngs, Sr., died, and the decedent and one Kelly were appointed his executors. Upon a settlement had, on December 24th, 1870, between Mrs. Lewis as surviving execu-

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trix of Ferris and the executors of Henry Youngs, Sr., it was ascertained that Youngs, Sr., as executor of Ferris, owed the estate \$10,350.97. For this amount the executors made their check to Mrs. Lewis, and took her receipt in full settlement. Mrs. Lewis endorsed the check, and gave it to her husband to deposit. The check was left by him in the safe of the decedent, to be called for, which Mr. Lewis did several days after, when he was informed by the decedent that he had used it, and he then offered Mr. Lewis his note payable "to Samuel I. Lewis, guardian," for \$10,000, and cash, \$350.97, in place of the check. Mr. Lewis says he demurred, but received the note and money. These moneys were a trust fund, to be held for the benefit of Mr. and Mrs. Lewis' minor children under the will of said Ferris. In May, 1874, the decedent paid Mr. Lewis on this note \$6,000, and gave a similar new note for the balance then unpaid, \$7,455.66. On November 1st, 1881, the sum of \$506 was paid on the second note, and on May 23d, 1883, the further sum of \$5,600, when the second note was taken up and a third note given for the balance then unpaid, \$5,574.59, which is still unpaid.

The \$10,350.97 check was deposited by the decedent in the bank to his credit, on February 21st, 1871. On that day, before depositing this check, his account was overdrawn \$1,179.61. Afterwards, on the same day, he drew from his account \$10,936.65, leaving his account again overdrawn \$2,116.26. After that day and before May 24th, following, he deposited various sums, and drew against the same, so that on the last mentioned day, there stood a balance in his favor of

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\$8,010.48. Out of this amount he drew \$1,500 and paid it to one Thompson as part of the purchase price of 30 acres of land sold by the latter to decedent, and on January 31st, following, the decedent drew and paid to Thompson the further sum of \$2,000, the balance of the purchase price. How much had been deposited and drawn out in the meantime does not appear, except the general statement of "large sums." He did not, however, at any time overdraw his account. It is proper to state that the knowledge of the decedent's bank account is derived from a cash account kept by him, which the parties assume to be a correct showing of the former.

Upon this state of facts, it is claimed in behalf of Caroline F. and Henry Y. Lewis, by their committee, that a resulting trust is raised in their favor in this 30 acres of land, so that they are entitled to be first paid from the proceeds of the sale before the general creditors.

When the executors of Youngs, Sr., gave their check to Mrs. Lewis as the executrix of Ferris, and took her receipt therefor, the trust fund under the circumstances, passed from them to Mrs. Lewis, and she became its custodian, and when the decedent subsequently received the check, he did so simply as a borrower from her, but with a full knowledge of the trust character of the fund. Whatever may be intended to be implied by the testimony of Mr. Lewis as to the manner in which the decedent possessed himself of the check, it is evident that Mr. Youngs considered it as a loan, and the subsequent acts of both Mr. and Mrs. Lewis were a recognition and rati-

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fication of the transaction as a loan. But it is said these children were minors, and *non compotes*, and hence never did or could consent to the transfer of the fund from the decedent as one of the executors of Youngs, Sr., to himself as borrower from the executrix. The payment to Mrs. Lewis as the surviving executrix of Ferris was a proper act and bound the *cestuis que trustent*, and the only right they can have to present their claim against the decedent's estate is by subrogation to the right of the executrix to do so. I do not consider the fact that the notes were made payable to "Samuel I. Lewis, guardian," changes the relation of any of the parties. He was not the guardian of the children, and could not recover on the notes, either as guardian or individually. His only standing in the transaction was that of an agent of his wife as executrix of Ferris.

Conceding the law to be that trust money can be followed not only into lands wrongfully purchased with it by the trustee, but also into lands purchased with it by one to whom the trustee has wrongfully loaned it, and *Wilson v. Foreman* (2 *Dickens R.*, 593), which is still quoted as good law, would seem to so hold, I am, nevertheless, of the opinion that this land is not impressed with this trust because of a failure to trace the funds into its purchase. The conversion of the trust moneys specifically, as distinguished from other moneys, into the property sought to be subjected to the trust must be clearly shown. It is not sufficient to show the possession of trust funds and the purchase of property (*Ferris v. Van Vechten*, 73 *N. Y.*, 113). This rule may appear to have been some-

what relaxed in a case where the moneys were intermingled with other moneys in a bank account, and that account drawn from, so that less than the trust fund remained. What remained was held to belong to the fund (*Rabel v. Griffin*, 12 *Daly*, 24). And so in another case, where trust moneys were intermingled with other moneys, and wrongfully invested in a stock of clothing, it was held the trust attached to the clothing, even as against general creditors (*Hooley v. Gieve*, 9 *Daly*, 104; 82 *N. Y.*, 625). In these cases, it was clear to be seen that the fund or some part of it was either actually in the bank account or clothing, or could be supposed to be.

In this case, the whole amount deposited had been drawn out, and, although subsequently made good, the account cannot be supposed to contain any part of the trust moneys. While it is true that when moneys are paid into bank they are indiscriminately mixed with the money of others there on deposit, and that the depositors probably will not again receive a dollar of the identical money deposited by him even if drawn within the hour, still in order to impose a trust on property purchased with money drawn from that bank account, it must be made to appear that the purchase was made with money which, except for the intermingling by the bank, would have been the identical money deposited; otherwise we might be confronted with several resulting trusts upon the same fund of money or property purchased by it, which from the very nature of the doctrine creating such a trust could not occur.

The preference claimed is not allowed.

MATTER OF TOWNSEND.

ORANGE COUNTY.—HON. R. C. COLEMAN, SURROGATE.—June, July, 1887.

MATTER OF TOWNSEND.

*In the matter of the estate of PETER TOWNSEND,
deceased.*

Testator died in September, 1885, aged 84 years, leaving a large estate, and leaving him surviving, three daughters, to one of whom, C., he gave, by his will, executed in 1883, besides certain absolute bequests, a life interest in more than two thirds of his property, with remainder to her children. Upon the judicial settlement of the account of the executors, it appeared that C. claimed certain personal property, consisting of a deposit in a trust company and railroad bonds, of the value of about \$120,000, as a gift from testator in his lifetime, which the other legatees contended belonged to the estate.

The bonds were purchased by the testator, and, after being registered in C.'s name, were retained by him, and found, after his death, among his papers, he having regularly removed the coupons and collected the interest. The money, amounting to over \$100,000, was, except the last item of \$4,000, deposited in the trust company, at different dates, before the execution of his will, in C.'s name, by the testator, who gave to the company a slip containing the former's signature, to be pasted in the signature-book. C. kept the pass-book in her possession, but never drew against the deposit. There was evidence of declarations by testator that he wanted to create a fund for C.'s benefit. It was contended that the alleged gifts were void for want of delivery, and that, if sustained, they must be regarded as adeeming, *pro tanto*, the provisions in C.'s favor, contained in the will.—

Held, that the gifts were valid, the control of, and title to the subject-matter having passed from testator to the donee; and that there was no ademption of the testamentary disposition.

Jackson v. Twenty-third St. R. R. Co., 88 N. Y., 520; *Young v. Young*, 80 *id.*, 422—distinguished.

Testator, by his will, gave the residue of his real and personal property to his executors, in trust to sell the former, and divide the proceeds of the entire residue into thirty-two equal parts; whereof he directed the executors to invest, in their names as trustees, five for the benefit of his daughter, M., eight for that of his daughter, B., and nineteen for that of his daughter, C., during their respective natural lives, and, at the death of each of his said daughters, to pay the principal in-

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vested for her benefit to her descendants. He appointed C. and two others "executors of this my will, and trustees of the several trusts hereinbefore created," and provided in case "any of said trustees" should die or become disqualified, for the appointment of a successor.—

Held, that the executors were not entitled to double commissions.

Laytin v. Davidson, 95 *N. Y.*, 263—distinguished.

CONTEST concerning alleged gifts *inter vivos*, upon judicial settlement of executors' account; and determination of question whether executors were entitled to additional commissions as trustees. The facts are stated in the head note.

PLATT & BOWERS, *for executors*:

Cited, in favor of donee's claim, *Bedell v. Carll* (33 *N. Y.*, 581); *Martin v. Funk* (75 *id.*, 134); *Noble v. Smith* (2 *Johns.*, 52); *Fulton v. Fulton* (48 *Barb.*, 581); *Schouler's Pers. Prop.*, vol. 2, § 67; *Francis v. B'klyn El. R. R. Co.* (17 *Abb. N. C.*, 1); *Grymes v. Hone* (49 *N. Y.*, 17); *De Caumart v. Bogert* (36 *Hun*, 382); *Robert's Appeal* (85 *Penn. St.*, 84); *Scott v. Simes* (10 *Bosw.*, 314); *Cooper v. Burr* (45 *Barb.*, 9); *Standing v. Bowring* (*L. R.*, 27 *Ch. D.*, 341); *Bennet v. Bennet* (*L. R.*, 10 *Ch. D.*, 474); *Dummer v. Pitcher* (5 *Sim.*, 35; *aff'd*, 2 *M. & K.*, 262).

G. L. RIVES, *for objecting legatees*:

Cited *Noble v. Smith* (2 *Johns.*, 52); *Grangiac v. Arden* (10 *id.*, 293); *Bedell v. Carll* (33 *N. Y.*, 581); *Westerlo v. De Witt* (36 *id.*, 340); *Young v. Young* (80 *id.*, 422); *Jackson v. Twenty-third St. R. R. Co.* (88 *id.*, 520); *Stokes v. Pease* (19 *Week. Dig.*, 310); *Bunn v. Markham* (2 *Taunt.*, 224); *Trimmer v. Danby* (25 *L. J., N. S. [Eq.]*, 424); *Farquharson v. Cave* (2 *Collyer*, 356). As to ademption, *Hine v.*

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Hine (39 *Barb.*, 507) ; *Exp.* Oakley (1 *Bradf.*, 281); Langdon v. Astor (16 *N. Y.*, 9); Benjamin v. Dimmick (4 *Redf.*, 7); Beebe v. Estabrook (79 *N. Y.*, 246); Alexander v. Alexander (1 *N. Y. State R.*, 508); Paine v. Parsons (14 *Pick.*, 318); Kirk v. Eddowes (3 *Hare*, 509); Dugan v. Hollins (14 *M'd. Ch.*, 139); Hopwood v. Hopwood (7 *H. L. Cas.*, 728); Miner v. Atherton (35 *Penn. St.*, 528); Leighton v. Leighton (*L. R.*, 18 *Eq.*, 458); Van Houten v. Post (33 *N. J.*, *Eq.*, 344); Lawrence v. Lindsay (68 *N. Y.*, 108).

THE SURROGATE.—To have constituted the transactions good gifts, two things were essential—an intention to give, and a sufficient delivery. The intention to give I think is clearly established. Was there a sufficient delivery? “The delivery must be such as to vest the donee with the control and dominion of the property, and to absolutely divest the donor of his dominion and control, and the delivery must be made with the intent to vest the title of the property in the donee” (Jackson v. Twenty-third Street R. Co., 88 *N. Y.*, 520).

By the registration of the bonds in Mrs. Crawford's name, Mr. Townsend placed them under her control and dominion, and divested himself of that control and of the title. It is true that he could and did retain the actual custody of the bonds, and also collected the interest accruing on them during his lifetime; but these acts are not conclusive evidence of ownership, nor do they disprove a gift. By his own act, Mr. Townsend caused that to be done (the registration

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of the bonds in Mrs. Crawford's name) which placed them beyond his control, except as to the mere custody of them, and thereby made it necessary, in case of a transfer of title, to apply to her for authority for that purpose. The moneys deposited with the trust company by Mr. Townsend were thereby made subject exclusively to Mrs. Crawford's control, and he so understood it, for he procured from her and delivered her signature to the bank, for its guidance for that purpose.

The distinction between this case and the cases of *Jackson v. Twenty-third Street R. Co.* (*supra*) and *Young v. Young* (80 *N. Y.*, 422), I think is that, in the case of *Jackson*, the intention to give was not shown, and, in the case of *Young*, there was an intention to make the gift shown, but nothing which could be construed to be a delivery. In the latter case, there was no parting with the dominion, nothing was done which precluded the donor from selling the bonds or exercising any other act of ownership over them. I am of opinion that the gifts in each instance were valid.

It remains to be determined whether these gifts are to be adjudged adempments, in whole, or in part, of the provision in the will for Mrs. Crawford. The greater portion of the \$102,020, deposited to the credit of Mrs. Crawford with the Trust Company,—in fact all but the sum of \$4,020, which was the amount of the last deposit,—were deposited by Mr. Townsend before he made his will. We are, therefore, to suppose that, at the time he made his will, he considered this fact in determining what portion he should give

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Mrs. Crawford by the will, and any amount advanced by him to her before that is not to be considered an ademption of what was given her by the will (Arnold v. Haroun, Gen. T. Sup. Ct., 5th Dept., 26 *N. Y. Week. Dig.*, 22).

Generally, advancements made by a parent to a child after the making of a will are presumed to be intended to extinguish a legacy to the extent of such advance, but this presumption may be overcome by evidence of declarations of the testator at the time of making such advancements, which show the intent with which the act was done, and if done with one intent, it will operate as an ademption, and, if with a different intent, otherwise.

I think the fair inference to be drawn from Mr. Townsend's remarks to Mr. Clark and Dr. Boyd is that the bonds and moneys were intended to be out and out gifts, and were not to be deducted from the portion given her by the will. I think this view is, in a measure, sustained by the nature of the legacy to Mrs. Crawford,—it is to her for life only,—and it can hardly be supposed that the testator intended, by making absolute gifts to Mrs. Crawford, to thereby diminish the fund to be received by her children.

The decree will settle the account of the executors as filed.

THE following opinion was filed, in the same matter, in July, 1887:

THE SURROGATE.—It is necessary to decide now whether the executors will be entitled to double com-

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missions in the administration of this estate, in order to determine whether they are now entitled to be allowed full commissions; for, if this is a case in which they will not be entitled to double commissions, they should, on this accounting, be allowed full commissions on sums received and paid out, and half commissions for receiving the balance still retained and not directed to be paid out herein.

The rule by which to determine this question is laid down by Judge FINCH, in *Johnson v. Lawrence* (95 *N. Y.*, 154) at page 160, where he says: "Where, by the terms or true construction of the will, the two functions with their corresponding duties co-exist, and run from the death of the testator to the final discharge, interwoven, inseparable and blended together, so that no point of time is fixed or contemplated in the testamentary intention, at which one function should end and the other begin, double commissions or compensation in both capacities cannot be properly allowed."

It is claimed, on behalf of the executors, that the testator contemplated such a point of time where, by his will, he directs his executors to hold the residue of his estate in trust for the benefit of his children and grandchildren. I am unable to discover the point of time at which one function is to cease and the other begin. The true construction of this provision of the will, it seems to me, is the one followed by the executors, *i. e.*, that his children are entitled to the income upon his estate (excepting the two parcels of real estate given to Mrs. Crawford and her children) from his death, not from and after a year from his

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death, or after settlement and judicial determination of the amount of the residue; in other words, that their duties in regard to these trust funds began at once, and will continue until the final distribution under the provisions of the will. It is true that a portion of the fund is and will be required to pay debts and expenses; still the duties under the trusts, as to the residue, began at once, and are inseparable in point of time, from their other executorial duties, and will continue blended until the final determination.

To reconcile the rule laid down in *Johnson v. Lawrence* (*supra*), with the facts in *Laytin v. Davidson* (95 *N. Y.*, 263), in which latter case the court allowed the executors double commissions, and upon which case the counsel for the executors herein rely, is not without its difficulties; but the difference between that case and this case seems to me to lie in the fact mentioned by Judge FINCH, at page 266. In that case, "the duty of division into shares and to receive and apply the income of the several shares to the use of the beneficiaries, respectively, could not be performed until the residue should be ascertained by an accounting." Be this as it may, however, the decision is stated to be based on the conclusion that "the will contemplated an eventual separation of the functions and duties," which, as I have pointed out, is not the fact in this case.

I, therefore, conclude that this is a case in which only one set of commissions can be allowed.

MATTER OF ELSTON.

ORANGE COUNTY.—HON. R. C. COLEMAN, SURROGATE.—June, 1887.

MATTER OF ELSTON.

In the matter of the application for revocation of probate of the will of JOSEPH D. ELSTON, deceased.

One employed and acting as the legal adviser of a testator, who becomes a subscribing witness to the latter's will, is competent, under Code Civ. Pro., § 835, to testify to facts appertaining to the question of due execution.

DECEDENT died in December, 1885, leaving a will dated November 3d, 1882, which was admitted to probate by the Surrogate of Orange county June 1st, 1886. This proceeding was to obtain a revocation of such probate on the petition of Amelia L. Quick, a niece. The application was resisted by the executor, John R. Haulstead, and Eliza Elston, executrix, who was also the widow and sole legatee of decedent.

Upon the hearing, Wilcox one of the subscribing witnesses, in substance testified that he did not see the testator sign his name to the paper, that the testator did not declare it to be his will to him, and that the testator did not request him to sign as a witness. He, however, said he was present in the room at the time, saw the will, signed his name at the request of the other witness, and saw the testator sitting at the table at which the will was signed. The other witness, Hulse, was the lawyer who prepared the will, and was at the time employed and acting as the

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attorney of the testator. He was permitted by the Surrogate, subject to objection under Code Civ. Pro., § 835, to testify to the facts incident to the execution of the will, but not as to other matters. He testified to a full and proper compliance with the statute.

H. D. WILCOX and E. P. HART, *for petitioner.*

T. S. HULSE, H. A. WADSWORTH, and W. VANAMEE, *for executors.*

THE SURROGATE.—The only objection to the probate, which is seriously urged, is that the testimony of the witness, Wilcox, shows a failure to comply with the statutory requirements as to the manner of execution of wills. Standing alone, this would be so, but a full compliance is testified to by the witness, Hulse, and the attestation clause, signed by Wilcox, shows the same. The witness, Wilcox, is an old man, apparently somewhat deaf and stupid, and evidently, very forgetful. I am satisfied from the evidence and by his manner, that Wilcox has forgotten many of the facts connected with the execution of the will, and that the will was executed in conformity with all the statutory requirements. It has been held frequently by the courts that mere failure of memory of a subscribing witness, will not defeat the probate of the will.

It is claimed, however, on behalf of the petitioner, that the evidence of the witness, Hulse, should be disregarded, because it should have been excluded upon the trial under § 835 of the Code of Civil Procedure. Although, at that time, Hulse was an attorney, and was employed and acting as the legal adviser of the testator, nevertheless, when the testa-

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tor requested him to become a subscribing witness to the will, he was thereby placed by the testator in another relation to himself than that of attorney and client, and another duty was imposed upon him, the very nature of which necessitated publicity. The duty imposed upon him, as a subscribing witness, was outside of and disconnected from any duty growing out of the other relation of attorney and client, and concerning which he was not only at liberty to testify, but in duty bound to do. The courts have even gone further and held that communications to an attorney, employed to prepare a will, with reference to the will and its trusts, are not privileged (*Matter of Austin*, 42 *Hun*, 516).

A decree will be made, denying the application to revoke the probate.

CATTARAUGUS COUNTY.—HON. ALFRED SPRING, SURROGATE.—July, 1886.

MATTER OF WOODWORTH.

*In the matter of the estate of LOTTIE M. WOODWORTH,
deceased.*

Code Civ. Pro., §§ 1832, 1833 and 1834, relating to the mode of impeaching or contradicting an inventory, were not intended to operate upon an accounting where a trustee's management of his trust is on trial.

A Surrogate's court cannot determine the right of inheritance of heirs at law, in a contested proceeding; nor is the division of real property or

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its avails within the compass of its jurisdiction, except where such property is sold pursuant to its decree under the statute.

Proceeds of a sale of an infant's land, made in his lifetime, are real property, and descend to his heirs, where he dies intestate during minority. Decedent died an infant, intestate, leaving, her surviving, a mother and three sisters. During her lifetime, certain land of which she was seized was sold in proceedings instituted for that purpose, and the proceeds of sale were paid to the county treasurer. After her death, her administrator, assuming the money to be personal property, obtained an order directing it to be paid to him, included the amount in his inventory, paid the bulk thereof to decedent's mother, and, after the death of the latter, paid thereout \$50 on account of her funeral expenses. Upon the judicial settlement of the administrator's account, on objection by the surviving next of kin,—

Held, that the money in question was real property, and retained its character as such notwithstanding the acts of the administrator in respect thereto, and that the court had no jurisdiction to determine the rights of inheritance thereof.

HEARING of objections to account of administrator of decedent's estate, interposed in proceedings for judicial settlement.

E. E. & G. W. HARDING, *for administrator.*

C. D. VAN AERNAM, *for objector.*

THE SURROGATE.—The petitioner in this proceeding was appointed administrator of intestate in the year 1870. At the time of her death, she was a minor, leaving her surviving no child, husband or father, but a mother and three sisters. The mother has since died.

Some time prior to the death of the intestate, certain real estate of which she was seized, and which was situated in Wyoming county, was sold in proceedings had therefor, and the proceeds of sale, amounting to over \$600, were paid to the treasurer of that county, pursuant to the order of the county judge.

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After her death the administrator, supposing this money was personal property, of which he was the proper custodian, obtained an order from the county judge, directing the treasurer to pay it to him, the administrator, which was accordingly done. Five hundred and fifty dollars of this were subsequently paid to the mother of decedent by the administrator, and later \$50 were paid to liquidate the funeral expenses of the mother, upon her death. These payments are objected to by the contestant, and the main controversy now arises, as to the character of this money so paid by the administrator, and, if "impressed with real uses" when received by him, what effect his action has, in inventorying and treating it as personal property.

If the purchase price of this real estate was the same as the land itself, the statute of descent would compel a partition or division of the fund among the heirs at law, and it would go to the mother for life, and upon her decease to the sisters (R. S., part 2, ch. 2, § 6; *Wheeler v. Clutterbuck*, 52 *N. Y.*, 67-72). In that event, the mother, by virtue of her life interest therein, would be entitled to the possession of this money, and the payments made to her by the administrator would be valid. At least, he could not be made to account for this money *as administrator*, for in that capacity he is only chargeable with the personal effects of deceased (*Shumway v. Cooper*, 16 *Barb.*, 556).

If, however, this money was personal property, it would be distributed to the mother and the sisters equally, according to the statute of distribution (R.

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S., part 2, ch. 6, tit. 3, § 90. And in that case, the payments made to the mother would be excessive, and the administrator would be liable to the amount of such over payments (*Adair v. Brimmer*, 74 *N. Y.*, 539, 558). So that it is essential to a proper disposition of this matter, to determine whether this money was descendible to the heirs at law, like real estate, or distributable to the next of kin, as personal property.

It is a general proposition, well sustained by authority, that the proceeds of the sale of an infant's lands are deemed and treated as real estate, and descend to his heirs at law, in case of his death intestate during his minority (*Forman v. Marsh*, 1 *Kern.*, 544; *Matter of Price*, 67 *N. Y.*, 231; *Horton v. McCoy*, 47 *N. Y.*, 21; *Sweezy v. Thayer*, 1 *Duer*, 286). This is necessary, to preserve intact the right of inheritance, as the statutes of descent and distribution are not the same. But in this case, the counsel for the contestant claims that, inasmuch as the administrator received this money on the hypothesis that it was personal estate, and inventoried it as such, and incorporated it in his account, he is now estopped from asserting the money to be real property, and that he cannot rebut and impeach his inventory. Sections 1832, 1833 and 1834 of the Code of Civil Procedure are re-enactments of long existing statutes, and, while they specify in what particulars an inventory can be rebutted or explained, also provide that the prohibition does not infringe upon any rule of evidence which the administrator was otherwise permitted to invoke, nor were these statutes designed to operate upon an accounting where the trustee's management of his

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trust is upon trial (*Thorne v. Underhill*, 1 *Dem.*, 306, 313; *Redf. Surr. Prac.*, 711; *McClellan Surr. Prac.*, 601).

The administrator makes his inventory soon after assuming the trust, and when ordinarily he is only slightly familiar with the estate of his intestate, and if he inadvertently causes property to be appraised which belongs to other parties, he should not be chargeable therewith. The obligation he assumes is to manage the property of the decedent, and when he has done that as the law directs, his duties to the next of kin end. Nor does the doctrine of estoppel apply to this case in favor of contestant. This money was paid to Mr. Randall with the knowledge of the next of kin, and they knew of these payments made to the mother, and did not interfere to prevent the administrator making them. But beyond all this, the bare fact that the administrator has seen fit to designate this money as personal property does not in truth alter its character. If that is so, then by that act the mother's right to the use of this property would be effectually cut off, for an estoppel is nothing unless reciprocal in its effect and operation (*Clute v. Jones*, 28 *N. Y.*, 284). The administrator in this case has given the usual bond, for what? To ensure to the next of kin a faithful performance of the trust committed to him—to-wit the management of the personal effects of the intestate as the statutes provide. The sureties guarantee to them a strict compliance with the terms of this bond, but their liability cannot be extended beyond its terms (*People v. Pennock*, 60 *N. Y.*, 421; *Miller v. Stewart*, 9 *Wheaton*, 680).

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Again the Surrogate's court can have no jurisdiction to determine the rights of these parties to this money. That court is one of limited jurisdiction, and its powers and limitations are prescribed and defined by statute (Code Civ. Pro., § 2472; *Bevan v. Cooper*, 72 *N. Y.*, 317, 327). It cannot determine the right of inheritance of heirs at law to real estate in a contested proceeding; nor are the division and partition of real estate, or its avails, within the compass of the Surrogate's jurisdiction, except by proceedings to pay the debts of decedent. The mere *ipse dixit* of an administrator, characterizing as personal property that which the law designates as real estate, does not in fact alter its character, so as to vest the Surrogate with jurisdiction. The jurisdiction of a court is not so pliable and elastic that it can be enlarged or restricted to suit the caprice of every suitor. The contestant must seek redress in another court for the proceeds of this real estate.

The administrator, in addition to the avails of this land, received, in 1870, \$202.97. He expended a few dollars of this, and the residue he has kept for a small portion of the time in bank, in his own name, but, for the greater part of this long time, he has had it stowed away in his bureau drawer. He testifies this could have been invested with reasonable diligence; and it was incumbent upon him to do so (*Shuttleworth v. Winter*, 55 *N. Y.*, 624, 631; *Hasler v. Hasler*, 1 *Bradf.*, 248).

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MATTER OF REUTER.

CATTARAUGUS COUNTY.—HON. ALFRED SPRING, SURROGATE.—June, 1887.

MATTER OF REUTER.

In the matter of the estate of AUGUSTUS REUTER, deceased.

Notwithstanding the passage of the married women's acts, husband and wife remain generally, in legal contemplation, one, and can contract with one another only in matters appertaining to, and when necessary for the protection of, the separate estate of the latter.

Upon the judicial settlement of the account of the widow, and administratrix of the estate, of decedent, who was a cheesemaker by occupation, the former presented a claim for services rendered by her in working with decedent at his business, and proved a promise by him to pay her therefor.—

Held, that the claim in question was not enforceable either at common law, or under the statutes of this State; and that the same should be disallowed.

HEARING of objections interposed by next of kin of decedent, to account filed by administratrix, in proceedings for judicial settlement.

LAIDLAW & MCNAIR, *for widow.*

W. H. TICKNOR, *for next of kin.*

THE SURROGATE.—Augustus Reuter died without issue, but left him surviving his widow. He was a cheesemaker by vocation, and his wife worked with him at that business. She presents a claim for the services so rendered, predicated upon a promise by him to pay her therefor. The evidence fairly shows that the decedent made such promises, and the only

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question is as to her legal right to enforce a claim of this kind.

Of course, at common law, no such claim could be made (1 Blacks. Comm. [Sharswood], 442; 2 Kent's Comm., 129). In the various statutes, passed since 1848 in our State, extending the rights of a married woman over her property, and also increasing her liability for the acts affecting her property, I do not find that she has been vested with any right to contract with her husband, unless the contract directly pertains to her separate estate. These statutes have frequently received a construction adverse to that of the claimant in this proceeding. In *Whitaker v. Whitaker* (52 *N. Y.*, 368), the husband gave to his wife his promissory note for \$4,000, for services performed by her in doing out-of-door work upon his farm. The note was proved by his widow against his estate, and allowed by the Surrogate, although under the objection of the collateral next of kin. The Court of Appeals reversed the decree of the Surrogate. At page 371, Judge RAPALLO, in giving the opinion of the court, says: "If a wife can be said to be entitled to higher consideration or compensation because she labors in the field, instead of in her household (which I do not perceive and cannot admit), the law makes no such distinction. It has never recognized the right to compensation from her husband on account of the peculiar character of her services. In most cases, she probably contributes more to the happiness of her family by the proper discharge of the delicate and responsible duties of her household, than by any outside labors, however ardu-

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ous. It is clear that the law regards neither as any consideration for a promise, founded thereon, from her husband."

In *Coleman v. Burr* (93 *N. Y.*, 17), the wife had taken care of the paralytic mother of her husband, upon his explicit promise to pay her therefor. The Court of Appeals, in deciding such a claim could not be sustained against the husband, say, at page 25: "It would operate disastrously upon domestic life, and breed discord and mischief, if the wife could contract with her husband for the payment of services to be rendered for him in his home; if she could exact compensation for services, disagreeable or otherwise, rendered to members of his family; if she could sue him upon such contracts, and establish them upon the disputed and conflicting testimony of the members of the household." See also pages 28 and 29.

The following cases are in the same line: *Bertles v. Nunan* (92 *N. Y.*, 158); *Fairlee v. Bloomingdale* (67 *How. Pr.*, 292); *Kaufman v. Schoeffel* (37 *Hun*, 140); *Noel v. Kinney* (15 *Abb. N. C.*, 403); *Barnett v. Harshbarger* (5 *N. E. Rep.*, 718); *Kniel v. Egles-ton* (4 *N. E. Rep.*, 573); 1 *Bishop, Mar. Wom.*, 35. These cases, while giving a fairly liberal interpretation to these statutes, and the rights and obligations of married women thereunder, still hold uniformly to the doctrine that, in legal contemplation, the husband and wife are still one, and, as between themselves, can only make such contracts as are necessary to protect her separate estate.

In each of the cases of *Benedict v. Driggs* (34 *Hun*, 94); *Granger v. Granger* (2 *State Rep.*, 211); and

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Fairbanks v. Mothersell (60 *Barb.*, 406), it pointedly appeared that the wife was possessed of a separate estate, and the acts there upheld were those especially relating to this estate. In the case under consideration, the husband was a cheesemaker, and the wife very naturally aided him in carrying on this business during the cheesemaking season, so that the case is not distinguishable from Whitaker v. Whitaker (*supra*).

If every service rendered by a wife for her husband outside of the household duties, strictly considered, can be made the basis of a charge against the husband's estate, it will practically abolish the making of wills by married men, for the wife can very easily absorb the estate in claims of this kind. Every hastily put admission, every statement made by the husband in commendation of his wife's services, would be tortured into an intention to compensate her for work really inseparably connected with the marital relation. The temptation to perpetrate fraud in the presentation of claims of this kind would be too patent and too available to be resisted. The widow who imagined she was wronged, by the disposition of her husband's property in accordance with the statutes of distribution or of descent, or by his will, would be very liable to seek what she would term "her rights" by claims for unusual services rendered her husband. A construction of these statutes permitting the enforcement of claims of this character would injure instead of benefiting married women, in that it would weaken the marriage relation, and foment domestic turmoil. The common law unity

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of the husband and wife, the disabilities incident to the marriage contract, so far as they affect dealings between themselves during coverture should be encroached upon with exceeding care.

The claim in this case should be disallowed, and I direct that an order be entered, accordingly.

ALBANY COUNTY.—HON. FRANCIS H. WOODS, SURROGATE.—September, 1886.

MATTER OF MCPHERSON.

In the matter of the estate of MARY MCPHERSON, deceased.

A Surrogate's court should not declare a statute void as unconstitutional, unless satisfied of its invalidity upon that ground, beyond a reasonable doubt.

L. 1885, ch. 483, entitled "an act to tax gifts, legacies and collateral inheritances in certain cases," does not contravene the constitution of the State, by reason of its conferring upon Surrogates powers unauthorized by that instrument, or omitting to require proper notice to be given to the persons to be taxed, or failing to state the object to which the tax is to be applied. *

APPLICATION by the district attorney of Albany county, to compel payment by the executors of, and legatees under the will of decedent, of the tax imposed by L. 1885, ch. 483.

HUGH REILLY, *district attorney, for the application.*

JOHN F. MONTIGNANI, ROBERT G. SCHERER and EUGENE BURLINGAME, *opposed.*

* Affirmed, *pro forma*, at General Term, and subsequently affirmed in Court of Appeals, 104 N. Y., 306.

MATTER OF M'PHERSON.

THE SURROGATE.—This is a proceeding instituted by the district attorney for the purpose of having the Surrogate assess and fix the cash value of the estate of Miss Mary McPherson, deceased, in order that the tax thereon may be collected pursuant to chapter 483 of the laws of 1885, entitled “An act to tax gifts, legacies and collateral inheritances in certain cases.”

Out of about seventy-five estates certified, as required by said act, to the county treasurer, this is the first contested proceeding, and, at the threshold of it, the attorney for the people is confronted with the objection that the act in question is unconstitutional. The proceeding may, therefore, be considered a test one, and more particularly so, for the reason that the courts have not, after controversy, passed on the validity of this statute.

The question of law raised on the arguments before me seem to be of such grave difficulty and importance that counsel representing almost the entire estate, candidly announce that, whichever way the question here presented shall be determined, an appeal is likely to be taken to the appellate courts. It is very desirable that the matter be speedily and finally settled, not only on account of the magnitude of interests of the State and the persons directly concerned, which are involved in it, but, also in order to avoid the possibly varying and conflicting decisions of the Surrogates' courts which might result in great embarrassments in the conduct of executors and administrators, and in the settlement of estates.

It is claimed that this act is unconstitutional; first, in that it confers upon Surrogates powers unauthor-

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ized by the constitution; second, in that proper notice is not required to be given to the persons to be taxed; third, in that the object for which the tax is to be applied is not stated. From such examination as I have been able to give the matter, and of the authorities to which I have been referred in the learned and ingenious briefs submitted by counsel, I cannot say that I am free from doubts as to the constitutionality of this act, nor can I say *beyond a reasonable doubt* that this act is null, void and unconstitutional.

It is said by Judge COOLEY that, when courts are called upon to pronounce the invalidity of an act of legislation passed with all the forms and ceremonies requisite to give it the force of law, they will never declare a statute void unless its nullity and invalidity are placed, in their judgment, beyond a reasonable doubt (Cooley Const. Lim., p. 181, 3d ed.). To same effect is *Embury v. Conner* (3 N. Y., 511).

Nothing but a clear violation of the constitution will justify the court in overriding the legislative will (C. R. v. 23d st. R. R. Co., 54 How., Pr., 180; Matter of Elevated R. R. Co., 3 Abb. N. C., 413). Every presumption is in favor of a statute until its violation of the constitution is shown beyond all reasonable doubt (*Ogden v. Saunders*, 12 Wheat., 270; 1 Am. Rep., 238).

In view of this doctrine so authoritatively laid down, and not being satisfied beyond a reasonable doubt that the act in question is unconstitutional, I am persuaded that in good conscience in this tribunal of the first instance, I should decline to pronounce it unconstitu-

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tional, but on the contrary should pronounce it a constitutional act, which I accordingly do.

On the proofs offered, and on the authority of the cases, *Hebrew Orphan Asylum v. Mayor* (11 *Hun*, 116); *People v. Commissioners of Taxes* (36 *Hun*, 311), I hold and decide that the following named legatees are not subject to any tax under the said act: "The Society for the Relief of Orphan and Destitute Children in the City of Albany," "The Home for Aged Men," "The Albany Hospital," and "The Albany Guardian Society."

Let a decree be entered accordingly.

ALBANY COUNTY.—HON. FRANCIS H. WOODS, SUR-
ROGATE.—October, 1886.

SMITH v. BUCHANAN.

In the matter of the judicial settlement of the account of CHARLES J. BUCHANAN, GEORGE M. WRIGHT and CHARLES McLAREN, as executors of the will of HENRY SMITH, deceased.

Proceeds of the sale of a decedent's real property, made by the executors pursuant to valid directions contained in the will, are to be reckoned as part of the personal estate, for the purpose of an allowance of commissions under Code Civ. Pro., § 2736, according to which, where the personal estate of a decedent amounts to \$100,000, or over, above all debts, three full commissions are distributable among three or more executors, according to the services rendered by them, respectively.

The statute enlarging the commissions of executors, etc., in case of the estates described, was based upon the theory that such an estate could

afford to suitably reward a faithful trustee for its administration, and that the rate previously allowed was too small to compensate him for the labor and responsibility involved.

Testator died, leaving an estate, which comprised both real and personal property, amounting to more than \$100,000, over all his debts, and a will appointing three executors, who qualified and acted, and to whom the residue, after certain specific dispositions, was given in trust to convert into money, hold and invest sufficient of the proceeds to provide for the payment of annuities, and ultimately to divide the entire principal among testator's children. The right to three full commissions, claimed by the executors upon their accounting, had after the death of the annuitants, depended upon whether the proceeds of realty disposed of by the former were to be considered, for this purpose, personal estate. Most of the parcels of such property had been conveyed, at agreed valuations, to the children, by the executors, who took receipts for the purchase price, and applied the amounts upon the distributive shares of the grantees.—

Held, that, under the will, the real property was to be converted into personalty, and distributed to the children as such ; and that the executors were entitled to three full commissions, to be awarded in proportions which appeared to have been fairly earned.

DECEDENT died December 1st, 1884. By the first clause of his will, executed June 19th, 1882, he gave his homestead at Cobleskill to his wife, in lieu of dower, during her widowhood, and thereafter to his son Henry, and also gave, in the same way, the library furniture and property therein, with right to the wife to use up all household stores. By the second clause, he gave to his mother during life the use of a house and lot in Cobleskill where she resided. The 3rd and the 6th clauses of the will were as follows :

“Third. To Charles McLaren, George M. Wright and Charles J. Buchanan *all the rest of my property in trust* for the following uses and with the following regulations: First. They shall not be required to give bail or make an inventory. They shall *manage and improve* the property *and let or sell it* as they think

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best so as to turn the same into money. They may compromise any matters as they think best so as to convert all into money as soon as can be to advantage and pay over the proceeds, keeping it well invested in the meantime, as fast as they can do it in view of the payments to be made. They must pay my mother, — dollars a week during her life and my wife, — dollars a week during her widowhood, and from that time, as the state of their funds on hand will allow it, to pay the balance to my children in equal parts."

"Sixth. When my wife and mother are dead, the fund required to be kept invested shall be turned into money or in kind be divided equally amongst all my children, and before that time any income that may not be needed to pay the sums I have mentioned, or to be invested to bring an income to pay such sums shall from time to time, as the same may accumulate to warrant it, be paid in equal parts to such children, but not more than ten dollars a week shall be paid to such children each until my son shall have attained the age of twenty-one years."

The son, Henry, was twenty-one years of age at his father's death. At the time of his death, testator had, as appeared by the executors' account, \$71,942.25 of personal property. Besides the "homestead" in Cobleskill, he also owned thirteen parcels of real estate, three in the city of Albany, nine in Schoharie county and one, the formal title to which he held subject to a defeasance. From this last parcel there was realized on a sale thereof, by consent of the grantor, \$6,200. The other parcels of real estate had, when the executors filed their account, with the exception

of a house and lot in the city of Albany, been sold and conveyed by the executors for \$49,087.94.

Most of these parcels were sold and conveyed, after considerable negotiations, to the three children of Mr. Smith, the executors taking from the purchasers receipts for the purchase price to apply upon his or her share in the estate of the father. The proceeds of the real and personal estate, at the time the account was filed, amounted to \$127,230.19—making over one hundred thousand dollars over all his debts. The only question raised was as to the commissions of the executors and the costs and expenses of the accounting.

The widow, and the mother, of decedent had died before the filing of the executors' account.

NATHANIEL C. MOAK, *for executors.*

GEORGE M. WRIGHT, and CHARLES J. BUCHANAN, *executors in person.*

J. SHEPARD SMITH, *for himself, as devisee and legatee of Fanny S. Rich.*

NORTON CHASE, *for Henry Smith.*

KATE S. PIERSON, *a daughter, and DEWITT C. DOW, as executor of Fanny S. Rich a deceased daughter, in person.*

THE SURROGATE.—The executors claim that, under § 2736 of the Code of Civil Procedure, they are entitled to three full commissions, to be apportioned among them according to the services rendered by them respectively, and, under § 2562, to their counsel fees and other expenses for settlement of the estate. Their right to three full commissions is challenged by J. Shepard Smith, a devisee and legatee of Fanny S. Rich a daughter of Mr. Smith, who died subsequently to her father.

The right to the three full commissions claimed depends upon whether the proceeds of the real estate, accounted for with the proceeds of the personalty, are to be considered and treated, on this accounting, as personal estate. The sales and conveyances of real estate to the children, the acceptance of the purchase price and receipting therefor as a portion of their share of the estate of the father was, in legal effect and in substance, a sale and conveyance of such real estate, and the same as if the purchaser had paid to the executors the purchase money and the executors had immediately repaid it as so much on the portion of the purchaser (*Pratt v. Foote*, 9 *N. Y.*, 463, 468; 10 *N. Y.*, 601; *Beach v. Smith*, 30 *N. Y.*, 131; *Wright v. Nostrand*, 24 *N. Y. Week. Dig.*, 418).

I am of opinion that, under the will of the testator, the real estate was to be converted into personalty and distributed to his children as such. The executors were vested with the legal title thereto; they were directed to sell it and "turn the same into money." They were to compromise claims, etc., "so as to *convert* all into money as soon as can be to advantage and pay over the *proceeds*, keeping it well invested in the meantime, as fast as they can do it in view of the payments to be made." After payments to the widow and mother they are "to pay the *balance* to my children in equal parts." By the sixth clause, what is not needed for investment to pay the annuities to the widow and mother is "from time to time as the same may accumulate to warrant it to be paid in equal parts to such children."

Under these provisions, and the authorities as I

understand them, this was a conversion of the realty into personalty. Such conversion was, in fact and in law, made by the executors, and the proceeds of the sales divided as personalty (*Lent v. Howard*, 89 *N. Y.*, 172; *Martin v. Sherman*, 2 *Sandf. Ch.*, 341; *Power v. Cassidy*, 79 *N. Y.*, 602; *Matter of Mahan*, 32 *Hun*, 73, *affi'd*, 98 *N. Y.*, 372; *Flanagan v. Flanagan*, 8 *Abb. N. C.*, 413; *Hatch v. Bassett*, 52 *N. Y.*, 359; *Dodge v. Pond*, 23 *N. Y.*, 69, 71; *Fisher v. Banta*, 66 *N. Y.*, 468; *Hood v. Hood*, 85 *N. Y.*, 561; *Bogert v. Hestell*, 4 *Hill*, 492.); it is to be considered as personalty from the time of the testator's death (*Lent v. Howard*, *supra*; *Roberts v. Corning*, 89 *N. Y.*, 226.; *Fisher v. Banta*, 68 *N. Y.*, 468; *Stagg v. Jackson*, 1 *N. Y.*, 206; *Fish v. Coster* 15 *N. Y. Week. Dig.*, 482; *Kain v. Gott*, 24 *Wend.*, 659).

The legal title was in fact vested in the executors and trustees (*Morse v. Morse*, 85 *N. Y.*, 53; *Tobias v. Ketchum*, 32 *N. Y.*, 319; *Leggett v. Perkins*, 2 *N. Y.*, 297; *Vernon v. Vernon*, 53 *N. Y.*, 358; *Brewster v. Striker*, 2 *N. Y.*, 19).

The power of sale, conferred on the trustees was absolute and imperative, without discretion except as to the time and manner of performing the duty imposed. It was, therefore, a valid express trust (*Cook v. Platt*, 98 *N. Y.*, 38), and the power to lease carried with it and included the power to receive the rents accruing from its execution (*Morse v. Morse*, 85 *N. Y.*, 59).

Even if the real estate were sold under a naked power, the executors and trustees were still bound to consider the real estate as personalty and account for

the personalty as such. In *Lent v. Howard* (89 *N. Y.*, 177, *supra*), there was no devise to the executors (see will, page 172) and the executors acted under a simple power of sale. The rents and proceeds of real estate were held to be personal property in their hands and they were held accountable therefor. See, also, *Marsh v. Wheeler* (2 *Edw. Ch.*, 157); *Bunce v. Vandergrift* (3 *Paige*, 37); *Stagg v. Jackson* (1 *N. Y.*, 206); *Hood v. Hood* (85 *N. Y.*, 561); Code Civ. Pro., § 2724, subd. 4.

The real estate having come into the hands of the trustees, having been treated in all respects as personalty and accepted by the parties in interest as such, it seems clear to me it should be so considered for all purposes including the estimation of the commissions of the trustees.

In *Cox v. Schemerhorn* (18 *Hun*, 16), the Supreme court, in the second Department, held that, where an executor sold real estate subject to mortgages, he was entitled to commissions on the whole purchase price, including the amount secured to be paid by the mortgages, and is not limited to commissions on what remains after deducting the amount of the mortgages therefrom. It is not necessary here to consider whether so much of this case as holds the executor entitled to commissions on sums which the purchaser never pays and he never receives or disburses, and as to which he never has any authority, is sound or not. The case is clearly an authority that he is entitled to commissions on what the purchaser pays, and the executor receives and disburses. In *Baucus v. Stover* (24 *Hun*, 109), it was held, in this Department, more

in accordance with my views of the law where an executor sells subject to a mortgage, and neither receives nor pays anything by reason thereof, that, where an executor under a power in the will authorizing a sale for the division of the proceeds, sells real estate subject to mortgages existing thereon, at the time of the testator's death, or sells the real estate free from the incumbrance, paying off such incumbrance from the proceeds of sale, he is only entitled to commissions upon the amounts actually received for the equity of redemption, and cannot charge them also upon the amount of the property sold (see opinion of BOCKES, J., page 114; LEARNED, J., page 115). It is true this case was reversed by the Court of Appeals (89 *N. Y.*, 1), but on an entirely different point, leaving this point under consideration untouched as an adjudication.

In the Matter of Leggett (4 *Redf.*, 148), CALVIN, Surrogate, said (p. 150): "It seems to me to be a too narrow construction to hold that section 71, above cited, confines the allowance of full commissions to three executors and trustees to such estates as reach \$100,000, over and above debts, in personalty. If commissions are to be allowed as a compensation for services rendered an estate by executors or trustees, whether for the receipt and disbursement of personal assets or the collection of rents and sale of lands, there seems to be no good reason why less should be paid for the latter than the former, as it may very often occur that the performance of the latter is much more laborious and troublesome. Obviously, the statute enlarging the commissions of executors in certain

cases was based upon the idea that commissions on an estate of \$100,000 under the former statute, were too small for the labor and responsibility of its administration, and that such an estate could afford to suitably reward a faithful trustee for its administration.

“The provision that it shall amount to that sum, over and above all debts, points directly to this latter reason. That such a statute should not be strictly and literally construed, so as to unreasonably circumscribe its effect, is declared to be the rule in *Mann v. Lawrence* (3 *Bradf.*, 425); *Wagstaff v. Lowerie* (23 *Barb.*, 207); *Matter of De Peyster* (4 *Sandf. Ch.*, 511). These cases hold that trustees are entitled to commissions upon real estate held in trust. I am of opinion that a reasonable construction of the statute in question entitles the executors and trustees to three full commissions.”

In *Savage v. Sherman* (24 *Hun*, 307), it was held that “trustees appointed prior to the passage of chapter 362 of the Laws of 1863, giving not to exceed three commissions to executors when the personal estate amounts to not less than \$100,000, are within the equity of that statute, and are entitled upon an accounting, had subsequent to the passage thereof, to the commissions given by it when the value of the estate vested in them, whether it consists of real or personal estate, or both, amounts to the sum therein named.” The decision of this case on appeal (87 *N. Y.*, 277, 287) did not question this portion of the decision of the Supreme court, but on the contrary affirmed it.

In *Phoenix v. Livingston* (101 *N. Y.*, 451), the fee

of the lands vested in the beneficiaries but the executors, under a power of sale, sold considerable real estate. RAPALLO, J., said (page 457): "Upon all sums of money thus realized and passing through their hands, they were entitled to commissions; but the unsold lands, at the close of the trust, passed to the possession of the remaindermen, not through any title derived from the trustees, but by force of the original devise." See, also, *Ward v. Ford* (4 *Redf.*, 47); *Matter of Rosevelt* (24 *Hun*, 325).

The testator himself had it in his power to determine whether his lands should be personal estate, whether the entire burden of their care and management should be thrown upon his executors, whether they should be compelled to account for the proceeds, and whether these should be distributed as money among his beneficiaries. If he so chose, it was legally personal estate from the time of his death, certainly in fact from the sale and conversion into money.

Having reached a conclusion that the executors and trustees should be allowed three full commissions, it only remains to consider how they should be "apportioned among them according to the services rendered by them respectively." Under this provision each should be awarded the proportion thereof which the evidence shows he fairly earned (*Matter of Harris*, 4 *Dem.*, 463, 466; *Hill v. Nelson*, 1 *id.*, 357, 362). This cannot, of course, be ascertained to a mathematical certainty. The evidence shows that Mr. Buchanan was a lawyer residing at Albany, Mr. Wright a lawyer residing in New York, and Mr. McLaren a merchant residing in Brooklyn, doing business in

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New York ; that Mr. Buchanan prepared all the papers and vouchers relative to the estate, including the deeds of the real estate ; that he conducted the negotiations for the sale thereof, and had the principal charge of such sales ; that he prepared the inventories, and, in several important matters, conducted the negotiations for settlement ; that Mr. Wright was frequently at Albany and Schoharie, relative to the business of the estate, and Mr. McLaren but a few times. It is evident from the situation of the estate, and of Mr. Buchanan's proximity of residence thereto, that the burden of the labors fell upon him. Upon the whole, I think that three twelfths of the commissions should be awarded to Mr. McLaren, four twelfths to Mr. Wright and five twelfths to Mr. Buchanan. The latter may not thus get a mathematical proportion, according to his services and responsibility, but it approximates justice as near as I can.

ORLEANS COUNTY.—HON. ISAAC S. SIGNOR, SUR-
ROGATE.—January, 1887.

MATTER OF WIRT.

*In the matter of the estate of HENRY J. WIRT,
deceased.*

Decedent, in pursuance of an ante-nuptial promise, but without other consideration, transferred a mortgage to his wife, by a written assignment, which provided that "the interest on said mortgage and the money thereby secured" were to belong to the assignor during his lifetime;

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and delivered to her the mortgage and assignment, retaining the bond in his own possession. Upon her accounting, as executrix, the widow claimed title to the mortgage as donee.—

Held, that the transfer could only be sustained, if at all, as a gift *inter vivos*; and that it was invalid as such, by reason of the interest retained in the subject by decedent.

HEARING of objection to account of executrix of decedent's will, in proceedings for judicial settlement.

W. M. JONES, *for executrix*.

GEO. BULLARD, *for objectors*.

THE SURROGATE.—The accounting executrix is also the widow of the decedent. The legatees and beneficiaries, or a portion of them, seek to surcharge the account presented with the amount of a certain mortgage for \$2,000, owned by the decedent during his lifetime, and certain other personal property. The widow claims that this mortgage was transferred to her by a written assignment by a delivery of the mortgage, without the bond, February 15th, 1883. It appears by the evidence that, before the marriage of the parties, which occurred January 30th, 1883, the decedent proposed that, on his marriage, he would give to his wife this mortgage as a bridal gift, to be used by her in religious and charitable work. For the purpose of carrying out this promise the parties went to the office of Mr. Bullard, and had the assignment drawn up in the usual form on the printed blank, but which contained, in addition to the usual provisions of an assignment, this clause: "The interest on said mortgage and the money thereby secured to belong to the said Henry J. Wirt during his lifetime." It also appears that the mortgage, and this assignment, after

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execution, were delivered to Mrs. Wirt by her husband, and that no consideration was ever paid therefor.

The transfer, if sustained at all, must be sustained as a gift *inter vivos*. I should find no difficulty in doing this, were it not for the clause above quoted. The acceptance of the mortgage was an acceptance under and in accordance with the terms of the assignment—consequently with the reservations therein contained. The question remaining is one as to the legal effect of such a provision in a paper attempting to convey a mortgage as a gift. The gift is no more effective because the promise of the gift was reduced to writing; the principles of law applicable are the same as if the transfer had been orally made and accompanied by an actual delivery.

An absolute gift requires a renunciation by the donor and acquisition by the donee of all the interest in and title to the subject of the gift. A portion cannot be retained and the remainder disposed of (*Cary v. Powers*, 17 *N. Y.*, 217; *Irish v. Nutting*, 47 *Barb.*, 383). In this case, the gift contains the express reservation, not only of the interest but of the principal so long as the donor shall live, and is practically only a gift to take effect at the death of the testator. It lacks all the important elements necessary to constitute a gift *causa mortis*. In *Young v. Young* (80 *N. Y.*, 432), it is said that, to establish a valid gift, the delivery of the subject of the gift to the donee or to some person for him, so as to divest the possession and title of the donor, must be shown; but in that case the question is raised whether it is practicable to make a valid gift, *in præsenti*, of an instrument securing

the payment of money, and reserving to the donor the accruing interest, and it is said that perhaps it may be done by a written transfer delivered to the donee; but if the donor, where there is no written transfer, retains the instrument under his control, although he do so merely for the purpose of collecting the interest, there is an absence of the complete transfer which is essential to the validity of the gift. But, aside from the delivery, a written instrument is no stronger than a verbal gift (*Rosenberg v. Rosenberg*, 40 *Hun*, 91). The writing at most can only take the place of the delivery of the security, but must transfer all legal title of the property sought to be conveyed, and must vest the entire legal title, upon the transferred undertaking to account to the donor for the interest he may collect thereon (*Young v. Young*, *supra*).

The express provision of this assignment was that the legal title of both principal and interest shall not pass to the transferee during the lifetime of the donor, but should pass at his death. Parsons on Contracts, chap. 15th, § 1, 5th ed.) says: "If it (the gift) regards the future, it is but a promise without consideration and has no validity"; and in *Rosenberg v. Rosenberg* (40 *Hun*, 91), it is said: "any gift of chattels which expressly reserves the use of the property to the donor for a certain period or as long as the donor should live is ineffectual (*Schouler on Personal Property*, 118; *Vars v. Hicks*, 3 *Murphy* [*N. C.*], 494)." This rule has been applied when the gift is made by a written instrument or deed purporting to transfer the title but containing the reservation; but the case under consideration is even stronger, for here there

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is an express reservation not only of the use but of the title, and notwithstanding the giving and the subsequent recording of the assignment containing the reservation. I have no doubt it was in the power of the donor to resume possession of his property at any time, or to make any other disposition of it during his lifetime, and that failing so to do it would become assets of the estate.

It appears from the evidence that the bond was never delivered. The assignment was, with the mortgage, placed in a box, to which both had access and in which they both kept their papers. The testimony of Mrs. Wirt is that she did not see it after some time the next spring; that she found he was unwilling that she should deliver the money to charitable purposes, and that without his knowledge she made an assignment to his son. This assignment was made, and thereafter she told her husband what she had done, and he asked her if she had reserved the interest, and, on her replying that she had not, he expressed dissatisfaction at her failure so to do. After this conversation, it appears that he took both the assignments away and left them with his counsel, where they remained up to the time of his death which occurred May 27th, 1885. She also says that she discovered that it was gone the same spring that they had a conversation about the transfer to William, perhaps a month after this conversation. She says that, some six weeks before the transfer to William, when she found that he was not willing that she should use it for charitable purposes, she asked what she should do with it, and he said she could assign it to William but

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reserve the interest, and that he did not know of it at the time she did make the assignment. If Mrs. Wirt acquired no title to the property by the transfer from her husband, she could transfer none to William. She could transfer only what interest she had in his assignment which expressly provided that it was subject to the right of the testator to receive the interest thereon, and also stated that it was intended to convey the interest of Sophia Wirt as conveyed to her by Henry S. Wirt.

* * * * *

A decree may be entered, surcharging the account with the amount of the mortgage, and otherwise allowing it as presented.

ULSTER COUNTY.—HON. O. P. CARPENTER, SUR-
ROGATE.—July, 1887.

MATTER OF LEFEVER.

In the matter of the estate of PHILIP A. LEFEVER, deceased.

Under L. 1885, ch. 483, entitled "An act to tax gifts, legacies and collateral inheritances in certain cases," property is not taxable unless and until it "passes" in the manner therein described. Hence, a contingent remainder, bestowed by will upon one not in a class exempted by the act mentioned, is not to be appraised or taxed, until the defeating contingency has been rendered forever impossible of occurrence.

Matter of Cogswell, 4 Dem., 248—distinguished.

THE executors of decedent's will having filed a petition for the appointment of an appraiser to ascer-

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tain the value of the property bequeathed, under L. 1885, ch. 483, and an appraiser having been appointed accordingly, and having made and filed his report, the legatees in remainder contended that their bequests were contingent and not then liable to assessment or taxation, and asked the opinion of the court upon the question.

JOHN N. VANDERLYN, *district attorney, for taxation.*

DAVID M. DEWITT, *for remaindermen.*

THE SURROGATE.—The decedent died October 1st, 1885, and his will was admitted to probate November 10th, of the same year.

The third clause of the will is as follows: "I give and bequeath to my sister, Catharine Bogardus, the income and interest, for and during the term of her natural life, of the amount of three thousand dollars of the stock of the Quassaick National Bank of Newburgh, New York, and the sum of three thousand dollars of county bonds of Otoe county, in the state of Nebraska, and from and after her death I give and bequeath the same to my nephews, Abraham Elting, Jacob Elting, Walter Elting and Philip L. Elting, children of my sister Sarah, or to the survivors of them who shall be living at the time of the death of the said Catharine Bogardus, in equal portions, share and share alike."

The fourth clause is like the third, except substituting Sarah, wife of Philip D. Elting, in place of Catharine Bogardus, and the bank stock of another bank.

By the laws of 1885, ch. 483, entitled "An act to tax gifts," etc., it is provided in § 2, "when any per-

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son shall bequeath or devise any property," etc., to a person, whereby the same is not liable to the tax, "during life or for a term of years, and the remainder to a collateral heir of the decedent," etc., at the decease of such life tenant, "or the expiration of such term, the property so passing shall be appraised immediately after the death of the decedent, at what was the fair market value thereof at the time of the death of the decedent," etc.

I think the act in question, and particularly § 2, must necessarily be held and construed, as to future estates, to apply only to vested remainders. A contingent remainder cannot be the "remainder" mentioned and intended in § 2, as liable to the tax, which by another section is due and payable at the death of the decedent, because, 1st, The person is uncertain to whom the remainder will pass; 2d, No interest whatever vests at the time of the decedent's death, when the tax becomes due and payable; 3d, In the event of the contingency happening; to wit, the death of the remaindermen before the death of the life tenants, which will defeat the ultimate vesting of the remainder; the property may pass to the lineal heirs of the decedent, and not be liable to the tax.

The bequests being to the nephews named, or to the survivors of them, who shall be living at the time of the death of the life legatees, are not followed by a gift over, in the event of the death of any one or all of them; as was the case in the Matter of Cogswell (4 *Dem.*, 248), cited to show that the remainders are vested, and therefore subject to the tax; and, therefore, "standing alone," as stated in the extract from

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Jarman on Wills quoted in the opinion of the court, these remainders are contingent. (See *Carmichael v. Carmichael*, 4 *Keyes*, 346; *Purdy v. Hayt*, 92 *N. Y.*, 446.)

When the property bequeathed or devised actually vests, that is "passes" to the collateral heir, then the tax becomes due and payable. In the case of a vested remainder, the vesting takes place at the death of the decedent. In the case of a contingent remainder, the vesting takes place when the defeating contingency has been rendered impossible; and then, and not until then, does the interest pass to a collateral heir and become liable to the tax.

A subsequent clause of the will directs that the life tenants shall respectively be entitled to the possession of the said stock and bonds, the income and interest of which is bequeathed to them during the term of their natural lives, for and until their death; when the parties, to whom the same are then bequeathed in fee, are to have the possession and ownership thereof.

The said stock and bonds may have become very much depreciated in value at the time they may pass to the remaindermen, and therefore should not be assessed until they actually pass, if ever, to them. I, therefore, hold that the property bequeathed to the legatees named, as aforesaid, is not yet subject to the tax, nor to be assessed.

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MATTER OF DUNKEL.

MONTGOMERY COUNTY.—HON. Z. S. WESTBROOK,
SURROGATE.—July, 1887.

MATTER OF DUNKEL.

*In the matter of the estate of JOHN DUNKEL, JR.,
deceased.*

The authority possessed by a Surrogate's court, to apportion commissions among co-executors, carries with it, incidentally, power to enforce payment of a sum awarded in such behalf, in like manner as any other moneys decreed to be paid.

It seems that the responsibility of his position, alone, entitles one of two or more co-executors to a share of the commissions, independently of the services rendered by him in the administration of his decedent's estate.

One of the two co-executors of decedent's will, who were also legatees thereunder, having filed a petition praying for a judicial settlement of the account of himself, and associate, and an apportionment of commissions, the latter set up and proved that petitioner and the other beneficiaries had executed an instrument acknowledging the receipt of their respective shares, and consenting to the entry without notice, of an order discharging respondent from office as executor. The sum due for commissions had also been agreed upon, and the entire amount thereof retained by respondent, though the evidence showed no intent, on the part of petitioner, to waive his right to a ratable proportion.—

Held, that the instrument in question did not affect petitioner's claim to a share of the commissions; that respondent could be compelled to account for the amount thereof, withheld by him, with interest, as for assets in his hands; and that the same should be apportioned between the executors according to the services rendered by them, respectively.

CONTROVERSY as to apportionment of commissions,
on judicial settlement of executors' account.

GEORGE F. CRUMBY, *for petitioner.*

HIRAM L. HUSTON, *for respondent.*

MATTER OF DUNKEL.

THE SURROGATE.—This is a proceeding on the petition of Peter J. Dunkel, executor of the will of John Dunkel, Jr., late of the town of Minden, deceased, for a final settlement of the accounts of himself and of his co-executor Harvey Dunkel, and for an apportionment of commissions. All the legatees are made parties, the executors being also legatees and interested in the residue of the estate. The controversy has resulted in a contest between the executors as to their rights in and to their commissions, Harvey retaining and claiming the whole, and Peter J. claiming a share to be determined and awarded by the court.

Harvey alleges a private settlement and a written release from payment of any share of the commissions, signed by Peter J. and the other legatees. No settlement nor accounting has ever been had in this court; but it appears that, on June 11th, 1884, the executors and other legatees came together at the law office of Harvey in Canajoharie, and there had a private settlement between them, of the proceeds of the estate in the hands of the executors, the bulk of the estate being then in Harvey's hands, and the amount then held by the executors was distributed. Harvey has not since received any further assets, and he is not now chargeable with more. Peter J. has since found and recovered assets then unknown, amounting to \$38, which are now in his hands.

The executors' commissions were agreed upon, at the time of the settlement referred to, at the sum of \$354, which sum Harvey then had and has since

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retained. Upon the distribution, the following receipt was prepared by Harvey, signed by Peter J. and the other legatees, and taken by Harvey, viz:

“ In the matter of the estate }
 of }
John Dunkel, Jr., deceased }

Received, June 11th, 1884, of Harvey Dunkel one of the executors of John Dunkel, Jr., late of the town of Minden, county of Montgomery, deceased, our and each of our respective shares, which we are and were entitled to, in the final distribution of the assets of said estate; and we do severally consent that an order be entered by the Surrogate of said county discharging said Harvey Dunkel as such executor as aforesaid from his said office without any notice to us.

P. J. Dunkel
W. J. Dunkel
A. E. Beardsley.”

It is well settled that executors are only entitled to claim or receive commissions by order of the court, upon a settlement of their accounts by the court (Redf. Surr. Prac., 708, 709, and authorities cited; Matter of Harris, 1 *N. Y. State Rep.*, 331; s. c., 4 *Dem.*, 463; Valentine v. Valentine, 2 *Barb.*, 430; Drake v. Price, 5 *N. Y.*, 430; Betts v. Betts, 4 *Abb. N. C.*, 317; Morgan v. Hannas, 13 *Abb. N. S.*, 361). The rule is different in cases of trustees, accounting annually to beneficiaries (Hancox v. Meeker, 94 *N. Y.*, 528; Matter of Mason, 98 *id.*, 527).

Of course, on a private settlement by parties, if commissions were agreed upon, and the amount retained by consent of the parties interested, without misrepresentation or imposition of any kind, the amount would be allowed to the executors by the court; not however as an absolute legal right, for exe-

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cutors and persons interested in an estate should always have their settlements before, or sanctioned by the court, so that the determination would be judicial and final. The receipt in question does not estop or prevent the executor Peter J., nor any of the other legatees, from calling Harvey to an accounting before the Surrogate's court. That right always exists unless and until a final judicial settlement has been had. Of course, if a private accounting and settlement has been had, honestly and fairly, it would be ratified and confirmed in the decree of the court. But the doors of the court cannot be shut against a judicial settlement, and a thorough investigation of the rights of parties, by receipts and private stipulations (*Harris v. Ely*, 25 *N. Y.*, 138; *Reilley v. Duffy*, 4 *Dem.*, 366; *Matter of Read*, 41 *Hun*, 95).

I think that the receipt given does not deprive the executor, Peter J., of his fair share of the commissions. Harvey may have so intended, but Peter J. did not so intend. He could not be deprived of his share without his consent. I am satisfied from the evidence given that Peter J. did not suppose or consent that Harvey should retain all the commissions, nor intend that the receipt released his share to Harvey. The receipt does not, upon its face, release the commissions. It is only a receipt for the distributive share of each, and a consent that Harvey be discharged by the Surrogate. It nowhere refers to the question of commissions, nor stipulates that Harvey shall have them all. Whatever effect might have been given to Harvey's discharge, had it been granted by the court, it is enough to say that the receipt was

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never filed, nor the discharge obtained; and now when all the parties are before the court in the appropriate proceeding, with all the facts, the court has full power, and it is its duty to adjust and enforce all the rights of the parties as between each other.

The power of the court, under the provisions of the Code of Civil Procedure, to adjust and enforce the rights of these executors between each other I consider ample and complete. The moneys in Harvey's hands (\$354) retained as commissions, not having been allowed nor apportioned by the court, are the same as so much assets in his hands undisposed of, and he can now be compelled to account for the same. That sum is now properly applicable to satisfy the claim of each executor for commissions. Presumptively, each executor is entitled to an equal share (*White v. Bullock*, 4 *Abb. Ct. App. Dec.*, 578). Commissions are intended to compensate executors or administrators for their services, care, and responsibility in the administration, and they should be apportioned upon the aggregate of the assets received and paid out, according to the services and care given, and the responsibility assumed by each in the entire administration of the estate (3 *R. S. Banks*, 7th ed., 2303; *Code Civ. Pro.*, § 2736; *Matter of Harris*, 4 *Dem.*, 463; *Hill v. Nelson*, 1 *id.*, 357).

It ought not to be held that, because one executor voluntarily, and perhaps by design, takes possession of all the assets, and transacts substantially all the business of the estate, he should receive all and his co-executor none of the commissions. The responsibility of the position alone should entitle an executor

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to compensation. But the commissions should, as the statute prescribes, be apportioned by the court, according to the amount of service rendered by each executor. Both executors in this case rendered valuable services to the estate. Harvey is a lawyer, and performed the greater part of the work and is entitled to the larger share. From the evidence produced, I think that Harvey should have two thirds, or \$236, and Peter J. one third, or \$118, and I so apportion them between them accordingly.

The authority given to the court, to apportion commissions, carries with it incidentally and necessarily the power to enforce payment thereof, the same as any other sum authorized and directed to be paid by decree or order of the court. The amount of the commissions, until allowed and apportioned by the court, as before stated, remains in the hands of the executors as assets, for which the court, with the parties before it, has ample power to compel an accounting, and to direct and enforce payment of the same to such parties and in such shares as the court may determine and decree. The balance of \$30 in the hands of Peter J. Dunkel, as shown by his account, may be retained by him, and applied towards his costs of this proceeding, and the same are allowed him for that purpose.

A decree should be entered, finally and judicially settling the account of the executors and each of them, and discharging each from any further liability on account of any and all assets received. To the sum of \$118, allowed to Peter J. for his portion of the commissions, must be added interest from June

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11th, 1884, amounting, at this date, to \$22, making a total of \$140.00, which sum shall be paid to Peter J. by his co-executor Harvey Dunkel. The proper decree will be prepared and entered accordingly.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—May, Nov., 1886; Feb., 1887.

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In the matter of the two several accountings of the executors of the will of JACOB WEEKS, deceased.

The purpose of the act, L. 1875, ch. 542—declaring that certain rents, annuities, dividends and other payments shall be apportioned so that *on the death of any person interested therein, or on the determination by any other means whatever*, of his interest, he or his executors, etc., shall be entitled to a proportion therein specified—as regards property devised, was to provide, not for the apportionment of rents as between those entitled to the testator's personal estate and the devisees of his real property, but for such apportionment as between successive takers of the realty.

Matter of Eddy, 10 Abb. N. C., 396—disapproved.

Under Code Civ. Pro., § 2737—enacting that where a “will provides a specific compensation to an executor, he is not entitled to any allowance for his services, unless, by a written instrument filed with the Surrogate, he renounces the specific compensation”—the time within which an executor may renounce his legacy is not limited by law. So long as he has not indicated his election between such provision and the statutory commissions, either by taking to himself one or the other, or by some other mode, his right to file a renunciation, and to avail himself of its benefits, remains unimpaired.

As to whether such a renunciation can be retracted—*quære*.

Testator, at the time of the execution of his will, and at his death, was the owner of a large estate, of which his personal property formed a trivial and insignificant portion. He appointed four executors, to each of whom, or such as might serve, he gave “the sum of \$1,200 annually,

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in lieu of all commissions or compensation allowed by law." By seventeen distinct provisions, certain parcels of realty were devised to the executors upon trust, to collect the rents, etc., and pay the same to specified beneficiaries during life, after proper deductions for taxes, and other charges, with respective remainders over. The will, however, in no instance, designated the executors as "trustees."—*Held*, that

1. In construing the provision for a salary to the executors, the court might inquire into the character and amount of the testator's estate, both at the time of execution of his will, and at the time of his death.
2. It appearing that the personal property would be little more than adequate for the payment of the fixed salary for a single year, while the will imposed upon the executors onerous and delicate duties in handling the real property and distributing its rents and profits, such salary must be deemed to have been intended as a reward for all services at any time rendered in connection with the entire estate.
3. It being impossible to fix upon any just and fair basis of apportionment of the salaries, as between the real estate and the personalty, and as between the life devisees and the remaindermen, the provision for executorial compensation must fail because of its vagueness and uncertainty.

The *per diem* allowance, authorized by Code Civ. Pro., § 2562, for preparing for trial, cannot be lawfully made except to a party accounting, and can be properly made to such a party only in so far as the labor of preparation is demanded by the best interests of the estate concerned.

Where two co-executors, who differed respecting matters appertaining to the execution of their trust, which might have been satisfactorily presented in one proceeding, filed separate accounts of their transactions, each of which was contested and referred, with substantially the same results that would have been accomplished, had the controversy arisen in respect of the account first filed,—

Held, that neither executor, nor any of the other parties, could recover costs or counsel fees out of the estate in both proceedings.

HEARING of exceptions to report of referee, to whom were referred the separate accounts, and objections thereto, of the two executors of decedent's will, in proceedings for judicial settlement.

VAN SCHAICK, GILLENDER & STOIBER, *for executor, Weeks.*

VAN WINKLE, CHANDLER & JAY, *for executor, Cornwell.*

ANDERSON & MAN, W. B. PUTNEY, ABNER C. THOMAS, J. MATTHEWS, H. B. BLAUVELT, *and EZEKIEL FIXMAN, for other parties.*

THE SURROGATE.—In his findings respecting the

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apportionment of rents I think the referee has erred. The statute, L. 1875, ch. 542, is in these words: "all rents reserved on any lease . . . granted after the passing of this act and all annuities and dividends, and other payments of every description, made payable or becoming due at fixed periods, under any instrument executed after the passing of this act, or (being a last will and testament) that shall take effect after the passing of this act, shall be apportioned so that *on the death of any person interested in any such rents*, annuities, dividends, or other payments as aforesaid, or in the estate or fund from or in respect of which the same shall issue or be derived, *or on the determination by any other means whatever* of the interest of any such person, he or she and his or her executors, administrators or assigns shall be entitled to a proportion of such rents, annuities, dividends and other payments according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person or of the determination of his or her interest."

There are three classes of cases to which the referee has found this statute applicable: (1) cases in which rents became due before Mr. Weeks died and were collected by him in his lifetime; (2) cases in which rents fell due in his lifetime and were collected by his executors after his death; (3) cases in which rents fell due after he died and have been since collected by his executors.

It is claimed by counsel for some of the contestants that the act of 1875 has no application to any of

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these cases; that its purpose, as regards property devised by will, was to provide, not for the apportioning of rents as between those entitled to the testator's personal estate and the devisees of his real property, but for such apportionment as between successive takers of the realty. A strong argument has been made in support of this contention, based upon the supposed reason of the law and the supposed mischiefs or inconveniences which its enactment was designed to remedy. It first appeared upon our statute book several years after the passage of the English apportionment act of 33d and 34th Vict., ch. 35. It is not, however, modeled upon that statute, but upon the apportionment act of 4th and 5th William IV, ch. 22, whereof it is almost a literal transcript. Indeed there are no differences in their phraseology that could possibly be claimed to justify or even to suggest a difference in their construction.

Vice Chancellor WIGRAM, in *Browne v. Amyot* (3 *Hare*, 173 [1844]), declared that the common law doctrine under which the profits and income incidental to the beneficial enjoyment of real estate followed the title to the premises (so that rents falling due before a testator's death would go to his personal representative, and rents falling due after his death would go to his heir or devisee) had not been affected by the then recent statute of 4th and 5th William IV. It was held that the term "person interested in any such rents," when taken in connection with the context, meant a person whose legal interest would *determine* or, in other words, cease and become extinguished, either upon his own death or upon the

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happening of some other event, and that such term was not at all descriptive, therefore, of a tenant in fee or absolute owner. The estate of absolute owner, which was admittedly the estate held by this testator in the property devised, did not determine, or, in other words, was not extinguished by his death. On the contrary, it is through him and by operation of his will that it passed to his executors in trust, and will ultimately be enjoyed by the several remainder men.

The decision in *Browne v. Amyot* was followed in 1852 by MAULE, J., in *Beer v. Beer* (12 *Com. B.*, 60, 77), and in 1857 by Vice Chancellor WOOD, in *Clulow's Estate* (3 *Kay & J.*, 689). The construction to which the English courts seem to have uniformly adhered while the apportionment act of 4th and 5th William IV was in force seems to be much more reasonable than that which commended itself to WESTBROOK, J., in *Matter of Eddy* (10 *Abb. N. C.*, 386). I feel constrained to adopt it, and all the more because the act of 1875 is thus brought into harmony with the provisions of section 6, tit. 3, ch. 6, part 2 of the Revised Statutes (3 Banks, 7th ed., 2295). That section declares that there shall be included among the property of a decedent's estate which shall be deemed assets, and shall pass as such to his executors and administrators as part of the personalty, "rents reserved to the deceased which had accrued" (*i. e.*, become due) "at the time of his death."

* * * * *

At the time Mr. Weeks made his will, and at the

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time of his death, his personal property formed a very trival and insignificant part of his possessions. It is well nigh inconceivable that he should have thought fit to appoint four executors for its management and disposition, or that having done so he should have given them each an annual compensation of \$1,200 for their services in its administration. On the other hand, he held numerous parcels of real estate of great value, and by his will he imposed upon his executors onerous and delicate duties in handling such real estate and in distributing its rents and profits. Under these circumstances, I cannot avoid the conclusion that when he bequeathed to the executors an annual salary of \$1,200, each, he fixed upon that sum as their reward respectively for all services that they might at any time render in connection with his entire estate, including the real property devised. It will be noted that although such real estate as was not given directly to the widow was given to the executors in trust, the testator nowhere refers to them by the name of trustees. The question is presented, what compensation, if any, should be now awarded to the parties here accounting. Prior to the adoption of the Code of Civil Procedure, it was declared by section 59, tit. 3, ch. 6, part 2 of the Revised Statutes (3 Banks, 6th ed., 101), that, "where any provision shall be made by any will for specific compensation to an executor, the same shall be deemed a sufficient satisfaction for his services, in lieu of the allowance aforesaid" (that is the allowance of statutory commissions) "unless such executor shall, by a written instrument, to be filed with the

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Surrogate, renounce all claim to such specific legacy."

In place of that provision, there has since been substituted § 2737 of the Code of Civil Procedure, which declares that "where the will provides a specific compensation to an executor, he is not entitled to any allowance for his services, unless by a written instrument filed with the Surrogate he renounces the specific compensation." It can scarcely be claimed that this change in phraseology was designed to effect any change in the policy of the statute. The "specific compensation" is still in the nature of a "legacy." No time is fixed by law within which an executor must choose between his statutory commissions and his testamentary bequest, and I see no reason to doubt that so long as he has not indicated his election, either by taking to himself one or the other, or by some other mode, his right to file a renunciation and to avail himself of its benefits remains unimpaired. Now, executor Weeks lately undertook to exercise that right, not having theretofore demanded or received any reward for his services and not having in any manner indicated his acceptance of the specific compensation. The referee has found that this renunciation is ineffective because it was not seasonably filed with the Surrogate. In this view I cannot concur. Nor do I deem myself authorized to permit Mr. Weeks to retract his renunciation, as he now offers to do, unless perhaps such retraction shall be consented to by all the parties to this accounting. Executor Weeks will therefore be allowed by decree herein his appropriate share of the statutory commissions upon the personal assets accounted for.

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Executor Cornwell has never filed any renunciation of his claim to the \$1,200 provision, nor did the executrix file such renunciation in her lifetime, and it is claimed that their acts in transferring to their co-executor their respective claims to the legacy given them by the will must be treated as a waiver on their part of any right to statutory compensation. On the other hand it is urged by Mr. Cornwell's counsel that it is impossible to make the testator's scheme for specific compensation operative, and that the provision establishing it must therefore be treated as practically void. I have found no reported case in which a testator's clearly expressed intention has been disregarded by the courts upon the ground that its execution would lead to inconvenient or unjust results, or results that the testator had probably failed to anticipate. But the question whether the provision referred to is valid or invalid cannot be here determined. Whatever might be my opinion on the subject, I ought not to hold that the provision is ineffectual until after a broader inquiry into its alleged impracticability than has been made in these proceedings, nor until persons interested who are not parties to this accounting have been afforded an opportunity to be heard.

On the other hand, if it be assumed that the disputed provision is valid, no award of compensation can be made upon the facts before me. I have already declared that in my opinion the bequest is intended as a reward for services respecting both real and personal estate. These accounts do not show the amount of the rents, nor do they show how much time and labor have been devoted to the management

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of the real estate, as compared with the time and labor devoted to other features of administration. It is, therefore, impossible to ascertain what proportion of Mr. Cornwell's salary or that which accrued to the executrix in her lifetime may properly be charged against the personal estate. The decree may reserve all questions as to the amount and basis of compensation to or on account of any of the persons who qualified as executor, except so far as in pursuance of this decision it shall award to executor Weeks statutory commissions.

* * * * *

Except in the particulars that I have indicated, the referee's report is confirmed."

In November, 1886, the following opinion was filed in the same matter:

THE SURROGATE.—In accordance with the decision of the General Term of the Supreme court in *Weeks v. Cornwell* (reported, in part, in 39 *Hun*, 643), I modify my decision of May 14th, 1886, wherein it was declared that persons other than those cited to attend these proceedings should be brought in as parties, before certain questions touching the compensation of the executors could be determined by the Surrogate. All who are interested in the determination of that question being now before the court, it becomes necessary to pass upon the validity and construction of that portion of the 32d article of the

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testator's will which undertakes to provide for the compensation of his executors. The provision in question is as follows :

“ I nominate and appoint my wife, Catharine Weeks executrix, my adopted son, Jacob Weeks Cornwell, my nephew, Samuel Weeks, Jr., and George Washington Weeks executors of this my last will and testament, and I hereby give to them each, or to such of them as may serve, *the sum of \$1,200 annually, in lieu of all commissions or compensation allowed by law.*”

It is insisted in behalf of some of the parties to this proceeding that the provision just quoted should either be treated as wholly invalid because of the impracticability of enforcing it, or should be construed as relating simply to the administration of the personal property by the executors, as such, and as having no application to their dealings with the real estate. The latter alternative cannot, it seems to me, be entertained for a moment. There are numerous and irrefragable reasons why the disputed provision, if it is held to mean anything at all, must be regarded as establishing the measure of the compensation which the persons selected by the testator to effectuate his testamentary purposes should annually receive for their entire services in that regard.

This interpretation is plainly written on the face of the will ; and, besides, if it is proper, as I think it is, to consider, in deciding the question under discussion, the character of the testator's estate at the time the will was made and executed, and at all times thereafter until his death, it is preposterous to suppose that

he could have intended by the 32d clause of that instrument to allow his executors, for services in administering upon his personal property, a fixed salary to whose payment, even for a single year, such personal property, all told, would be little more than adequate.

As was suggested in the memorandum of May 14th, the will does not from its beginning to its end make use in a single instance of the word "trustee." It is for "executors" alone that it provides compensation, and it is only upon executors that it imposes any duties or responsibilities. By seventeen distinct provisions certain parcels of real estate are devised to the executors, upon trust to collect the rents, profits and income thereof and to pay the same to a specified beneficiary during his life, after proper deductions for taxes, assessments, insurance and repairs. In every instance the properties so devised are to go upon the death of the beneficiaries to a specified remainderman. If I am correct in holding that the testator's bequest of \$1,200 annual salary to his executors was intended in part as compensation for the management of these trusts, then, unless such bequest is for some cause invalid and ineffectual, the burden of paying the salaries of the executors must somehow fall upon the *cestuis que trustent* for life of the real estate devised.

How can any reasonable scheme be established for carrying into effect the testator's purposes? Is the will definite and certain enough in this regard to warrant a court in declaring that this or that suggested mode of apportionment is warranted by its terms? These are questions that demand an answer, despite the fact that the executors are here accounting for

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the personal estate only. For if the salary bequest is valid, the parties to this accounting may properly insist that the decree about to be entered shall adjudge what sum, if any, shall be therein awarded to executor Weeks, in view of the agreement to which his associates and himself are parties, as the proportion of the total compensation to which, but for such agreement, such associates would be now entitled under the will. The vain effort which I have made, to fix upon any just and fair basis of now apportioning the burden of these salaries between the real estate and the personalty, and of apportioning it hereafter between the various persons having life interests in the real estate trusts, has forced me to the conclusion that the testator's provision for compensating his executors must fail because of its vagueness and uncertainty.

It is not necessary to discuss in detail the difficulties which stand in the way of practically enforcing this provision. Many of these have been pointed out by counsel. Who can say, in the absence of any direction by the testator, how he intended that the salary charges should be apportioned? Shall the apportionment be made, for example, in the ratio of the gross income of the several beneficiaries, or in the ratio of their net income, or in the ratio of the value of the services required in the management of the several trusts? Suppose that a conclusion is reached upon this point, and suppose it to be determined that the salary expense must be borne by the *cestuis que trustent* in the ratio of their gross income, and suppose the executors to have in hand at a given time

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certain income belonging to one of these trusts,—how much shall they pay over to the beneficiary? In order to determine that question, they must first ascertain the aggregate income of all the trusts for the entire year; and as they cannot be certain that all the trusts will outlast the year, and as, in case any of them should determine by the death of the beneficiary, the *corpus* of that trust would pass at once to the specified remainderman, the only course which the executors could pursue, in justice to themselves and the beneficiaries, would be to retain until the end of the year a portion of the income of each trust presumably sufficient to meet their claim.. The will, however, gives no authority for such withholding. Similar obstacles would stand in the way of adjusting the portion of salary to be charged to each trust if the apportionment should be based upon net income instead of gross income, or should be fixed with reference to the value of the trustee's services. In view of the impediments to the practical execution of the provision of the testator's will which relates to the compensation of his executors, I hold that provision is void for uncertainty.

One effect of the foregoing decision is to make the tripartite agreement ineffective for the purposes of this proceeding. That agreement does not pretend to make any assignment or transfer except of the \$1,200 salary given to the executors by the will. The decree will award to the accounting parties such portion of the statutory commissions as they may show themselves entitled to receive. Any expense that may attend a controversy in this regard must be de-

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frayed out of the aggregate commissions (Matter of Harris, 4 *Dem.*, 463).

* * * * *

The following are extracts from the opinion filed in February, 1887, upon settlement of the decree:

THE SURROGATE.—The decree proposed by the attorneys of executor, Weeks, is in substantial conformity with my decisions of May 14th, 1886, and November 3rd, 1886. Certain of the amendments proposed by executor Cornwell's attorneys should, however, be allowed.

* * * * *

The provisions suggested by Mr. Candler, respecting the payments of commissions, costs, etc., may be substituted for the provisions suggested by Mr. Man, and for this reason. The testator left real estate of great value, and an insignificant amount of personal property. Nearly all of the latter was specifically bequeathed to his widow, and it has been decided by the Supreme court, that her title is absolute, and that resort must be had to the real estate to satisfy the claims of creditors, before the personal property bequeathed to the widow can be used for that purpose.

Before this decision was announced, the executors had applied a portion of the personal property to the payment of debts, and there are now in their hands no funds wherewith to pay the expenses of this accounting. A large portion of the real estate is specifically devised, some of it in fee and some of it in trust. By the 24th article of his will *, the testator

*See *Weeks v. Cornwell* (104 N. Y., 325).

gave to his executors all the rest, residue and remainder of his estate, real and personal, in trust for certain specified purposes. By the 25th article, the very property referred to in article 24 is, upon the termination of the trust, given in fee to the several "legatees" under the will, in proportion to the value which the provisions in their behalf respectively bear to each other.

The trust attempted to be created in the 24th article has been pronounced void by the Supreme court, but it by no means follows that that article may not be so far effective as to impress upon the property devised by article 25th, the character of a residuary fund. If it has that effect, any changes which, by reason of a deficiency of personal assets, may fall upon the real estate, must fall upon this particular portion of the real estate, rather than upon any portion specifically devised. If, on the other hand, it should be decided that the burden imposed upon the real estate by the Supreme court decision must fall entirely upon the income of the several trust estates, it is manifestly impossible to direct the application of any definite sum from the income of any particular trust without a full account of the receipts of all the trusts as well those that have fallen in, as those that are still existing.

After careful consideration of the matter under discussion, I am convinced that in the decree to be entered herein no direction can properly be given as to the fund from which shall be paid the commissions and costs of this accounting, except a direction that the executors shall pay the same out of that part of

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the testator's estate not specifically bequeathed or devised to his widow.

On April 9th, 1883, executor Weeks filed a petition for the judicial settlement of his account, alleging therein that his co-executor had refused to unite with him in the proceeding. On July 10th, 1883, the return day of the citation, executor Cornwell filed an answer to the Weeks petition, in which he set forth the reasons for this refusal. The proceeding was adjourned to September 11th, 1883. On September 8th 1883, executor Cornwell filed his petition for a separate accounting and took out citations returnable on October 25th, 1883. On October 4th, 1883, executor Weeks filed his account together with a reply to Cornwell's answer, alleging that that answer furnished no adequate excuse for the course of action which it undertook to defend.

On October 25th, 1883, the return day of the citation on executor Cornwell's petition, Weeks filed an answer thereto praying that the proceeding be dismissed upon the ground that the estate should be spared the expense of two accountings. On January 18th, 1884, executor Cornwell filed his separate account. It does not appear that the Surrogate was asked to pass upon the issues raised by the petitions and answers above specified until after the coming in of the referee's report. The referee found that there was such a difference of opinion between the executors, as, in his judgment, justified them in accounting separately. In my memorandum of May 14th, 1886, I stated that this portion of the referee's report, to which some of the parties had excepted, was only im-

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portant as bearing upon the question of costs and allowances, and that its consideration would therefore be postponed until the settlement of the decree. Applications are now made for costs and counsel fees not only by the two executors, but by five other persons who are here represented. The special guardian of an infant interested in the estate also makes claim to compensation.

These several applications are formally presented in both the accounting proceedings. Although the two accounts were filed pursuant to separate petitions and citations, there has practically been but one litigation. Before executor Cornwell's account was presented, objections had been interposed to the account of executor Weeks by the several parties in interest, including Mr. Cornwell himself, and including also Mr. Cornwell in his capacity as executor of Catherine Weeks, in whose will he was named as residuary legatee.

The issues of the Weeks accounting were submitted to the referee on December 29th, 1883, and to the same referee were submitted on November 17th, 1884, the issues of the Cornwell accounting. Although, in certain formal respects, the earlier proceeding and the later were kept distinct, nearly all the testimony taken in the one was by common consent admitted in the other. The cases were summed up together, and although in each of them the referee filed a separate report, the two reports covered substantially the same ground and were accompanied by a single opinion in which the referee gave his reasons for the conclusions which the report embodied.

MATTER OF WEEKS.

All the matters respecting which the executors differed might, it seems to me, have been as satisfactorily presented in one proceeding. Cornwell inserted in his own account a personal claim against the estate for a debt alleged to have been due him from the decedent. But this claim was disallowed by the referee, and the disallowance was confirmed by the Surrogate. In all other respects, the practical results of the litigation are the same that would have been accomplished if the controversy had arisen in the Weeks accounting alone. I hold, therefore, that none of the parties hereto are entitled to costs or counsel fees in both proceedings.

In computing the *per diem* allowance, regard may be had to the total number of days actually occupied, whether in the one accounting or in the other. It appears that the number of days so occupied in the taking of testimony and in the summing up before the referee was twenty-four. On three occasions, questions relating to these accountings have been discussed before the Surrogate. The parties to whom costs may be awarded under § 2561 of the Code of Civil Procedure will therefore be allowed as for twenty-seven, less two, or twenty-five days.

Section 2562 authorizes an additional allowance to an accounting executor for the time necessarily employed in preparing his account and in preparing for trial. This allowance for preparing for trial cannot lawfully be made to any party except a party accounting, and can properly be made to such a party only so far as the labor of preparation is demanded by the best interests of the estate.

The claim of executor Cornwell to counsel fees under § 2562 I feel compelled to disallow in considerable measure.

The account of executor Weeks who was engaged far more actively than his associate in the management of this estate, was on the files of the court for more than three months before that of Cornwell was presented. The Weeks account was not claimed by executor Cornwell to be incomplete or incorrect, except as regards certain variances between himself and his co-executor which might have been satisfactorily indicated upon its face.

The Cornwell account is in almost all respects a literal copy of the Weeks account, and its transcription cannot have been a laborious or protracted task. I have said that the allowance for preparation for trial, sanctioned by § 2562, can be claimed by the accounting party only, and in his capacity as representative of the estate. It must often happen that such a representative has a personal interest in the estate as legatee or creditor; it is manifestly not the policy of the law to give such a person, merely because of his official relation to the estate, an advantage, in respect to allowance of costs, over other legatees or creditors, in a proceeding brought by himself for the protection of his individual as distinct from his representative interests.

Now the order of reference in the Cornwell accounting was not entered until November 7th, 1884; and the trial did not commence until December 26th. The great bulk of all the testimony submitted to the referee had been taken upon the hearing in the other

MATTER OF WEEKS.

accounting. In that proceeding Mr. Cornwell had appeared in the attitude of a contestant, and by far the largest part of such preparation for trial as was made in his behalf must unquestionably have been devoted to the protection of his individual interests.

The decree may make provisions for costs and counsel fees as follows :

To executor Weeks

Costs	\$ 70
25 days at trial	250
158 days preparing account and preparing for trial	1,580
Total	<u>\$1,900</u>

And disbursements.

To executor Cornwell.

Costs	\$ 70
25 days at trial	250
40 days preparing account and preparing for trial	400
Total	<u>\$720</u>

And disbursements.

To James W. and Martha Trask,

Costs	\$ 70
21 days at trial	210
Total	<u>\$280</u>

And disbursements.

To Henry A. Weeks

Costs	\$ 70
25 days at trial	250
Total	<u>\$320</u>

And disbursements.

And a like allowance to Mr. Blauvelt, and to the parties respectively represented by Mr. Thomas, Mr. Matthews and Mr. Fixman.

214 CASES IN THE SURROGATES' COURTS.

MATTER OF LICHTENSTADTER.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—July, 1886.

MATTER OF LICHTENSTADTER.

In the matter of the estate of SOPHIA LICHTENSTADTER, deceased.

The will of decedent, which bequeathed a share of her residuary estate to two of the infant children of her son, provided : “ And I hereby appoint my said son, S., guardian of the said estate of his said children ; ” and authorized S. to expend principal and income in the care, education and maintenance of the infants. Upon an application by S., to compel payment to him, by the executor, of the share bequeathed to his children,—

Held, that the attempt to create a guardian, though abortive as such, in effect constituted petitioner a trustee of the property bequeathed, and that the same might be turned over to him, without his obtaining letters of guardianship.

PETITION by Solomon Lichtenstadter, for decree directing payment to him, by executor, of legacies bequeathed to his children by the will of decedent.

SIMON STEINFELDER, and GEORGE F. MURRAY, for petitioner.

THE SURROGATE.—By the seventh clause of her will, this testatrix bequeathed a certain share of her residuary estate to her grandchildren Rosalie and Sarah, infants, the children of her son Solomon.

“ And I hereby appoint my said son Solomon,” the will says, “ guardian of the said estate of his said children : said Solomon is not to be required to give any bond or security in the matter of said guar-

MATTER OF LICHTENSTADTER.

dianship, and he is hereby authorized to expend such portion of the principal, interest, income, rents, issues or profits of their said estate, in the care, education and maintenance of said children as to him may seem advisable."

A legacy bequeathed directly to an infant must, if it exceeds \$50 in value, be paid to its general guardian, and such guardian, before he can claim the legacy, must (except in a case where, in pursuance of § 2746 of the Code of Civil Procedure, the Surrogate has relieved him) furnish the bond required by that section (see amendment, L. 1886, ch. 358; and *McLoskey v. Reid*, 4 *Bradf.*, 334; *Rieck v. Fish*, 1 *Dem.*, 79; *Matter of Moody*, 2 *id.*, 624; *Toler v. Landon*, 3 *id.*, 337).

Now the infants, in behalf of whom this application is made, have no general guardian. The testatrix has attempted, by her will to constitute their father the guardian of their estates. This she was unable to do in law. The power of appointing the guardian of an infant can only be exercised by the courts having authority in such cases, or by the infant's father or mother (*Fullerton v. Jackson*, 5 *Johns. Ch.*, 278; *Hoyt v. Hilton*, 2 *Edw. Ch.*, 202; R. S., part 2, ch. 8, tit. 3, § 1; 3 *Banks*, 7th ed., 2346).

I am disposed, however, to think that the provision above quoted from the will, though abortive as an appointment of a guardian, has in effect made this petitioner a trustee of the property bequeathed to his children; and that that property may properly be turned over to him without his obtaining letters of guardianship. But in view of the fact that less than a year has elapsed since the executor received his let-

MATTER OF ROWLAND.

ters testamentary, he cannot be directed to pay the legacies in question except upon the filing of a bond as prescribed in such cases by § 2719 of the Code of Civil Procedure.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—July, 1886.

MATTER OF ROWLAND.

In the matter of the estate of WILLIAM F. ROWLAND, deceased.

Where an executor or administrator has lost a voucher, relating to a payment for which he asks credit upon his accounting, the burden is upon him to prove "that the charge is correct and just" (Code Civ. Pro., § 2734), as against a party objecting to its allowance.
2 R. S., 93, § 58, as amended by L. 1863, ch. 362—compared.

HEARING of exceptions to report of referee to whom were referred the account, and objections thereto, of the administrator of decedent's estate, in proceedings for judicial settlement.

MORGAN & WORTHINGTON, *for administrator.*

FRANKLIN BARTLETT, *special guardian.*

THE SURROGATE.—I think that the referee is mistaken in supposing that the burden of proof as to that item in the account regarding which the special guardian has interposed an exception rested upon the contestant. Where a voucher taken by the representative of an estate is lost, the payment to which such voucher relates, and for which such representa-

MATTER OF ROWLAND.

ust be proved before such credit
ode Civ. Pro., § 2734), and it must
estimony of the person to whom it
person be living and can after dili-
nd (id.). And even after the fact of
established, credit therefor cannot
the Surrogate is satisfied that the
nd just" (id.).

in this particular, very much like
y virtue of which the Surrogate is
to accounting executors or admin-
owance for their actual and neces-
hall appear just and reasonable."
on to consider this language and
does not warrant the allowance to
y of a disbursement claimed to have
as an expense of administration,
jection is made to such allowance,
and reasonableness of such dis-
matively shown to the Surrogate's
in v. McKee, 2 *Dem.*, 236; Jour-
, 320).

se submitted in this case, I find that
te was in fact paid by the adminis-
was "correct and just." The spe-
ption must, therefore, be overruled,
he referee confirmed.

MATTER OF KEELER.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—July, 1886.

MATTER OF KEELER.

In the matter of the estate of DAVID B. KEELER, deceased.

A decree, admitting a will to probate, may be opened, at the instance of a former contestant, to enable him to apply for a judicial construction of its provisions.

MOTION to open decree admitting decedent's will to probate.

GEORGE B. ASHLEY, *for executor.*

RICHARDS & BROWN, *for contestant.*

THE SURROGATE.—The decree admitting this decedent's will and codicil to probate may be opened, for the purpose of allowing their former contestant to obtain a construction of that clause in the codicil, by which it is provided that the proceeds of sale of certain lots on Ninth avenue in this city shall "go to and form a part of the testator's personal estate, and shall be divided in like manner as provided in his will for the disposition of his "other personal estate." For the reasons urged by counsel for the contestant, I am of the opinion that, by the provision above referred to, the proceeds in question go to Mrs. Baker during her life or widowhood, and at her death or marriage to her issue, and to the contestant and his issue, in accordance with the scheme established by the fourth clause of the will.

MATTER OF FERNBACHER.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURRO-
GATE.—July, 1886.

MATTER OF FERNBACHER.

*In the matter of the estate of WOLF FERNBACHER,
deceased.*

A beneficiary under decedent's will having, by his attorney, instituted a special proceeding to compel the executors to account, with a view to securing his interest in the estate, entered into an agreement in writing with such attorney to pay the latter, in consideration for his services, one half the amount for which the party's interest might be compromised or settled, giving the attorney a lien on said sum, and stipulating not to compromise his claim without the attorney's knowledge. The will conferred upon the executors a power to sell decedent's real property.—*Held,*

1. That such agreement was valid and binding upon the party.
2. That none of the real property unsold by the executors, under the testamentary power, could be included in estimating the value of the party's interest,—the executors not being bound to account therefor.

A PREVIOUS phrase of the litigation relating to this estate is reported in 4 *Dem.*, 227. Isaac Fernbacher a son of decedent, and a remainderman under his will, having, by his attorney, Jacob Marks, instituted proceedings for an accounting by the executrix and executors of his father's will, and subsequently moved for the revocation of their letters, upon the grounds of waste and improvidence in their administration, and a decree having been rendered revoking their letters accordingly, entered into a stipulation with the executrix and executors for a settlement and discontinuance of all the proceedings, upon the satisfaction of his claims under the will. Thereupon the executrix and executors filed a petition asking for a discontinu-

MATTER OF FERNBACHER.

ance according to the terms of the stipulation ; which application was opposed by said attorney, Jacob Marks, upon grounds which are stated in the opinion.

LAUTERBACH & SPINGARN, *for executrix and executors.*

IRA D. WARREN, *for Jacob Marks.*

THE SURROGATE.—I hold, with the referee herein, that the agreement upon which Isaac Fernbacher's attorney bases his claim for compensation is a valid agreement, and binding upon Fernbacher. That agreement is in words following :

“ In consideration of services rendered by Jacob Marks and to be rendered by him in the prosecuting and carrying on of the contest against the estate of Wolf Fernbacher, deceased, I hereby agree to pay said Jacob Marks one half the amount for which my interest in or against said estate may be compromised or settled, besides his taxable costs, and I hereby give him a lien for said half on any interest which I have in said estate or any sum which my interest may be determined to be worth, and I hereby charge my said interest in said estate, or what my interest may be determined to be worth or compromised for, with said half, it being understood that I am to pay all the necessary disbursements which may be required to be paid in the prosecution of said contract ; the said I. Fernbacher not to compromise his interest without the knowledge of said Marks.

Witness my hand and seal this 21st day of November, 1885.

ISAAC FERNBACHER.”

For ascertaining whether, in the settlement which

MATTER OF FERNBACHER.

Fernbacher has lately effected or sought to effect, such claims of his attorney as this court is competent to enforce have been recognized and protected, it is necessary to determine, *not* the extent and value of all the interest that Fernbacher ever had in this estate, but the extent and value of such interest as he had at the commencement of the accounting proceeding, and as these executors could be held answerable for in that proceeding if it should be prosecuted to a decree. It is one half of the sum *thus* arrived at, together with taxable costs, that this court should secure for Mr. Marks, before permitting the discontinuance of the pending proceedings heretofore instituted in behalf of his client. And,

First. There must be deducted from the total value of the estate the value of the widow's life interest.

Second. No portion of the real estate unsold should be taken into account for the purposes of the present inquiry. The referee, in ascertaining the amount of Isaac Fernbacher's interest, has included the three pieces of real property at ave. B.. 20th street and 43d street. The executors have never exercised respecting these properties the discretionary power of sale conferred upon them by the will. Although Isaac Fernbacher has transferred to his brother and sister, since the entry of the decree removing the executors, his interest in all this estate, real and personal, and has released to the executors all claim for any liability on their part to him, such transfer and release have not, in my judgment, changed the conditions of the problem here presented for solution.

MATTER OF FERNBACHER.

In the course of my decision in the proceeding for revocation of the letters of these executors, I used the language following: "In view of the relation which the widow and children of the decedent sustained towards the estate, it was clearly the duty of the executors to collect as soon as practicable the personal property left by the decedent. This duty they owed to the remaindermen, who were entitled to be informed of the true nature, condition and value of the assets, and to have such of them as were outstanding realized and recovered."

I adhere to the view, intimated in the words just quoted, that, in the accounting proceeding, the executors were not bound to account for the unconverted real estate left by the testator, and it is plain that they could not now be required to account for any share in the real estate which any of the parties entitled thereto may have seen fit to alienate. It has been at all times competent for such parties to dispose of their interests in such real estate, despite the power of sale conferred upon the executors. Whatever lien Isaac Fernbacher's attorney may have, as against the interest of his client, in such property, this court is powerless to protect or make effectual, because of its inability to compel the executors to account for such property.

* * * * *

MATTER OF BROWN.

Y.—HON. D. G. ROLLINS, SURROGATE.—July, 1886.

MATTER OF BROWN.

*the estate of ANN T. BROWN,
deceased.*

utor of a will sells the testator's real property
ferred upon him by that instrument personally
he should not include the proceeds of sale in his
re the same chargeable with executorial commis-

jections to account of executor,
s for judicial settlement.

executor.

for heirs and next of kin.

E.—Mr. Hamilton, whose accounts
estate are now before the Surro-
nt, has derived, in his capacity of
er or authority over the real estate
atrix. That portion of such real
derived from her husband's will is
her children and their issue. The
uired is devised to this accounting
not as executor but in trust for
ed by the will. He has disposed of
y by virtue of power of sale which
upon him. The proceeds of such
ed in the account now before him,

MATTER OF DAVIDSON.

and upon such proceeds he claims commissions as executor. As I have, already intimated, his trust with respect to this real estate is of a purely personal nature. It is not one that is attached to the office of executor. The proceeds of such real estate have not, by virtue of any of the provisions of the will, come into the hands of the executor as such, should not have been included in his account, and are not chargeable with executor's commissions.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—July, 1886.

MATTER OF DAVIDSON.

In the matter of the estate of JOHN B. DAVIDSON, deceased.

Where a direction to an executor, to pay a specified sum to a person named, is contained in a decree admitting a will to probate, want of assets may be set up in answer to an application to punish for contempt for disobedience thereto.

ORDER to show cause why executor should not be punished for contempt for refusing to pay to petitioner \$106, awarded to him as stenographer's fees by decree admitting will to probate.

LOUIS F. POST, *for Edw. F. Underhill.*

GIBBONS & HOUSE, *for executor.*

THE SURROGATE.—The decree by which this re-

LATTER OF SELLING.

ted to pay the petitioner moneys
 was not entered in a proceeding
 , as a result of inquiry, judicially
 terminated that the respondent had
 be in his hands applicable to the
 er's claim; on the contrary, the
 nt was given in the decree admit-
 ate. The contention of petition-
 pondent cannot now interpose the
 ets as a reason why he should not
 empt in disobeying the decree in
 Motion denied.



—HON. D. G. ROLLINS, SURRO-
 E.—August, 1886.

TTER OF SELLING.

the estate of ERNESTINE SEILING,
deceased.

riding for a decree directing payment of a leg-
 of a year from the issuance of letters testa-
 of of certain facts therein specified, and the
 d—has no application to the case of a legacy, or
 h the will expressly directs to be paid within
 ecutor may require a bond to be executed in
 ions of 2 R. S., 90, § 44.

a decree directing payment of an instalment of
 \$500, after the same had become payable by the
 recutor filed an answer setting forth, upon in-
 at petitioner had unlawfully come into posses-
 e value of \$4,000, *formerly belonging to dece-*
 nt was entitled to the possession as executor,

MATTER OF SELLING.

and had unlawfully converted the same, and refused to transfer them, or to pay their value; and that an action was pending between the parties "for the recovery of said bonds or their value."—

Held, that the answer was insufficient as a defence, under Code Civ. Pro., § 2718, subd. 1.

PETITION for payment of legacy.

KURZMAN & YEAMAN, *for petitioner.*

LAUTERBACH & SPINGARN, *for executor.*

THE SURROGATE.—By the will of this testatrix, there is bequeathed to her son Joseph a legacy of \$1,700, payable in instalments. An application is made by this legatee for an order directing the executor to pay him the first instalment, amounting to \$500. The testatrix died in March, last, and her executor received letters in April. He insists that, as a year has not yet elapsed since he qualified, the petition should be dismissed for its failure to allege the existence of such a state of facts as, within the restrictions of § 2719 of the Code of Civil Procedure, can alone justify the direction for which the petitioner prays.

This contention is, it seems to me, unsound. To the case at bar § 2719 has no application. It is the object of that section to provide that, under certain specified circumstances, an executor may be required to pay a legacy in whole or in part, even before the expiration of a year, and even though the testator has given no direction for early payment, provided that such payment is necessary for the support and education of the legatee.

Here the testatrix expressly provides that, in three months after her decease, the petitioner shall receive \$500, on account of his legacy. It is declared by

MATTER OF SELLING.

§ 44, tit. 3, ch. 6, part 2 of the R. S. (3 Banks, 7th ed., 2300), that in case a legacy is directed by testator to be paid within a year succeeding the grant of letters, the executor may require a bond with two sufficient sureties conditioned that if any debts against the deceased shall duly appear, which there shall be no assets or insufficient assets to pay without resorting to such legacy, the legatee shall refund in whole or in part as circumstances may require.

Upon the revelations of the petition and answer, I find nothing in the apparent condition of the estate, to deter me from granting the order prayed for, except the allegation of the respondent upon information and belief that the petitioner "on or about the 17th day of March, 1886, wrongfully came into possession of four bonds" (specifying certain bonds stated to be of the value of \$4,000) *formerly belonging* to the said Ernestine Selling, deceased, to the immediate possession of which this deponent as the executor of the estate of the said Ernestine Selling, deceased, is entitled, and has unlawfully converted and disposed of the said bonds to his own use, and wrongfully refuses to transfer the said bonds or to pay their value to said estate. The respondent further alleges the pendency in the Supreme court of an action between himself as executor and this petitioner "for the recovery of said bonds or their value."

It appears, by a memorandum attached to the brief of petitioner's counsel, that his client has interposed to the respondent's complaint an answer wherein he denies its material allegations. It seems to me that, in spite of this denial, I should be bound to dismiss

MATTER OF PLACE.

the petitioner's application, without prejudice to an action or to an accounting, if that application were met by an answer conforming to the requirements of § 2718 of the Code of Civil Procedure (Smith v. Murray, 1 *Dem.*, 34). Those requirements are not met by the answer already filed (Lambert v. Craft, 98 *N. Y.*, 342). The executor is allowed five days within which to interpose another; otherwise an order may be entered granting the petition upon the execution of a proper bond.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—August, 1886.

MATTER OF PLACE.

*In the matter of the estate of SUSAN A. PLACE,
deceased.*

The authority of an administrator with the will of a decedent annexed is, under Code Civ. Pro., § 2582, *ipso facto* suspended by an appeal from the decree granting his letters, and so remains unless the Surrogate by order confers upon him the limited powers in that section specified.

MOTION for stay of proceedings, pending appeal from decree granting letters of administration with decedent's will annexed.

CHAS. F. WELLS, *for the motion.*

THOS. P. SHERMAN, *opposed.*

MATTER OF PLACE.

THE SURROGATE.—An appeal having been taken from the decree whereby Emeline P. Hayward was appointed administratrix, *c. t. a.*, of the estate of this testatrix, I am asked by the appellants to grant a stay of proceedings. The application is opposed on behalf of the administratrix to whom letters have been issued pursuant to the direction of the decree. Section 2582 of the Code of Civil Procedure declares that an appeal from a decree granting letters of administration shall not stay the issuing of the letters, “where, in the opinion of the Surrogate manifested by an order, the preservation of the estate requires that the letters shall issue.” The section further provides that, in case letters shall have been actually issued before such appeal, the executors or administrators may exercise certain power and authority “on a like order of the Surrogate.” The appeal in this case has, therefore, operated, *ipso facto*, as a stay, and authority of the administratrix pending such appeal is suspended, unless and until an order shall be made by the Surrogate, manifesting his opinion that the preservation of the estate demands the exercise by the administratrix of such limited authority as that for which § 2582 provides.

MATTER OF TILDEN.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—August, 1886; Jan'y, 1887.

MATTER OF TILDEN.

*In the matter of the estate of WILLIAM TILDEN,
deceased.*

Where, upon an accounting by testamentary trustees, it appears that they have on hand surplus income of a fund, held by them for the satisfaction of annuities and other charges under the will of their testator, they cannot be directed, against the objection of those entitled to the residue, to hold such surplus in order to meet the possible future demands of those annuities and charges, as this would be to sanction an unlawful accumulation.

Executors who surrender to the government U. S. bonds, called by the latter, being assets of their decedent's estate, cannot be held thereby to *collect a debt*, within the meaning of a provision in the will allowing them five per cent on all sums received from the "collection of debts owing" to the decedent.

It seems, that a testamentary provision in favor of executors, in lieu of statutory commissions, the amount "to be divided among them from time to time," is substantially a legacy, payment whereof may be awarded in respect of transactions embraced in an account already settled by decree, and without opening the same.

Testator, by his will, which allowed to the executors, "on the proceeds of sale of real estate, one per cent. of the amount received," gave the residue of his estate, real and personal, to his children, in equal shares, authorizing his executors to execute all conveyances necessary to effect a division, or in order to sell and convert into money any part of his real estate. A division, *in specie*, of certain of the real estate having been made among the children, by deeds executed by the executors and others interested,—

Held, that commissions on the proceeds of sale of real estate were not earned by the action of the executors, in such allotment and conveyance.

A disallowance of an item in a trustee's account, representing a sum retained by him as commissions, the retention whereof has been sanctioned by a decree entered upon a judicial settlement, cannot be effected by denying commissions on a subsequent accounting, in an amount equal

MATTER OF TILDEN.

overpayment, nor until such decree has been open-

to open a decree of his court depends upon Code
bd. 6, which does not include a case where such ad-
l as based upon an erroneous theory of law.

ceptions to report of referee, to whom
sixth account of the executors of
and the exceptions thereto, filed in
judicial settlement.

executors.

LAND, D. J. NEWLAND, GEO. W. ELLIS, CHAS.
DW. P. KENNARD, and W. S. MACFARLANE,

E.—Upon the coming in of the report
whom were submitted the sixth ac-
tator's executors and the objections
exceptions have been interposed in
counting parties, and certain others
rs persons interested in the estate.
e exceptions, it is on all hands agreed
aspects, it need now to be considered.
lates to the finding of the referee
tisfaction of certain annuities and
e testator's will, "the whole of the
heir" (the executors') "hands should
hem," and no portion thereof be dis-
ent among the other beneficiaries.
t property is shown by the account
1, but on behalf of certain objectors
a portion thereof, amounting, as the
o \$29,109.01, should be treated as

MATTER OF TILDEN.

surplus income ; and that, conceding for present purposes that all funds in excess of such \$29,109.01 should be held intact to meet the annuities and charges, that sum, or such larger or smaller sum in excess of principal as upon the settlement of this account may be discovered to be in the executors' hands should be straightway distributed.

I think that this claim is well founded, By reference to Schedule B., parts two, three and four, it will appear that the gross income accounted for is \$140,570. 29 ; Schedule C. discloses that the aggregate payments thereout amount to \$111,300.28 ; the difference is \$29,270.01. This sum seems to be a clear excess of income above annuities and other charges. To permit its retention for meeting the possible future demands of annuities would be to sanction an unlawful accumulation (§ 37, tit. 2, ch. 1, part 2, R. S., 3 Banks, 7th ed., 2178 ; §§ 3, 4, tit. 4 ch. 4, part 2, R. S., 3 Banks, 7th ed., 2257.)

The surplus may therefore be distributed.

Second. Exceptions have been filed to the conclusions of the referee respecting the amount of commissions to which he finds the executors entitled.

The basis of computation of commissions is fixed by the will. Its 18th article is as follows: "In lieu and exclusive of all other commissions and compensation to my executors for performing their duties under this will, and in addition to their actual and necessary disbursements and expenses, I authorize them to receive from my estate the following commissions, namely, on all sums to be received from my said partner as my capital in said partnership and on

MATTER OF TILDEN.

all interest and income on investments in the public debt of the United States, or in county bonds, and on the proceeds of sale of real estate; one *per cent.* of the amount received, and on all sums received from personal property sold or rents or the collection of debts owing to me or for income of other funds or investments, five *per cent.* of the amounts received, and on all sums of money invested by them two *per cent.* of the amount thereof."

Counsel for Beverly B. Tilden and Edward T. Kennard, as his trustees, objected before the referee to the allowance of five *per cent.* claimed by the executors as commissions on the following items: One of \$25,000 (the value of certain United States bonds left by decedent as a part of the assets of his estate, and subsequently called in by the Government); another of \$2,000 (the principal of Holy Trinity Church bonds collected by the executors); and a third of \$500 (of a character similar to the item next preceding). These objections were overruled by the referee, who has found that all the bonds in question were debts owing to the testator. This finding, so far as it relates to the church bonds, is doubtless correct; but the proposition that bonds of the United States Government, held by the testator at his death, must be deemed, within the meaning of the 18th clause of his will, "debts owing to me" (him) is, in my judgment, erroneous. In strict technical sense the import of the word "debt" is doubtless broad enough to cover bonds of every sort, as well those in which the State or Government is obligor as those in which the party binding himself is a private individual. But in com-

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mon parlance, bonds of the United States are not spoken of as constituting or evidencing a debt of the United States, and the word "debt," as ordinarily used in connection with the administration of decedents' estates, has a narrower signification than is here sought to be put upon it.

If a testator should direct his executors to collect immediately after his decease all debts owing to him and to sell such as had not fallen due, and invest the proceeds of such collection and sale in United States bonds, it could scarcely be claimed that obedience to such direction would require the executors to dispose of whatever government securities should have come to their hands from their testator and straightway apply the proceeds to the purchase of others. When the executors who are here accounting surrendered to the government the registered bonds which have occasioned this discussion, it is very unlikely that they would themselves have characterized the transaction as the collection of a debt. It was not in pursuance of their duty to collect debts that they made the surrender, but because the securities which they gave up would henceforth bear no interest, and would accordingly cease to have the character of an investment. For rewarding the labors and stimulating the zeal of his executors in the collection of debts, it seemed fit to this testator to allow them a commission of five *per cent.* And what were they instructed to do with the moneys obtained by such collections? The will by its 14th clause specifies "registered stocks of the United States" as the first named among the securities in which the executors are directed to invest the

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funds of the estate. It will be observed also that, by the 18th clause above quoted, the testator makes provision for commissions at one *per cent.* for the collection of interest and income "on investments in *the public debt* of the United States." This phrase, which is in close proximity to the phrase "debts owing to me," has the same meaning of course as the term "stocks" in article 14. There is, therefore, taking the two articles together, a direction by the testator substantially as follows: Collect all *debts owing to me* " and invest the proceeds in (among other things) the "*public debt*" of the United States. This is to my mind a very significant antithesis.

I have no doubt of the testator's intention to give his executors liberal compensation for their services, and I might hesitate to adopt a construction of article 18 which would exclude investments in United States bonds from the category of debts due the testator if the executors would be thus deprived of compensation for their care and pains in effecting an exchange of securities held by the testator for other securities of a similar character; but under the terms of the will, as I interpret it, the executors became entitled upon such exchange to a commission of two *per cent.*, which, indeed, they have already claimed and received. The referee's report allowing commissions at five *per cent.* upon this item of \$25,000, must therefore be overruled.

Third. The conclusion just arrived at compels me to deny the application of the executors to be allowed an additional four *per cent.* by way of commissions upon the value of certain other United States bonds

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found among the assets of the testator at his death and subsequently redeemed by the Government.

Fourth. The remaining question upon which I am now asked to pass is clearly presented by the following stipulation entered into by the objectors:

"It will be conceded that, during the period covered by the fifth accounting, and in accordance with the provisions of an agreement executed by the widow and four sons of the testator and under the direction or supervision of the executors, real estate left by the testator was valued by chosen appraisers at \$525,190.66, and, having been divided into four parcels, was allotted to or among the four sons, to whom, or for whose account the several allotments were respectively conveyed by the executors, by deeds to which the widow and sons of the testator were also parties. No commissions on such value of real estate have been computed or realized by the executors, who now claim the same (amounting at the rate of one per cent. to \$5,201.99) as having been erroneously omitted on the said fifth accounting.

"The application of the executors for rectification of this error is to be heard and disposed of upon the same footing and with like effect as if any and all formal preliminaries had been had to enable the court to entertain and dispose of the application, and the executors are to be considered as moving in due form in so far as may be deemed necessary to reopen the decree upon the fifth accounting for the sole purpose of correcting said error. But the other parties, while waiving all objections as to preliminaries or to the form of the motion, do not conceive that the commissions

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ought to be computed and allowed as claimed, nor that the fifth accounting or the decree thereon ought to be reopened for that purpose."

Upon this state of facts, the question first presented is this: Are the executors precluded by the decree above referred to from obtaining the relief for which they now ask? Their counsel insists that they are in a very different situation from that which they would occupy if they depended for their compensation upon the provisions of the statute. He admits that in a case where, in accordance with § 2736 of the Code of Civil Procedure, and § 58, title 3, ch. 6, part 2, R. S. (3 Banks, 7th ed., 2303), commissions had been allowed by the Surrogate upon the settlement of a decree in an accounting proceeding, there might be grave doubts whether any additional commissions could subsequently be awarded with reference to any of the transactions covered by that decree, and equally grave doubts whether, when a decree had been entered making no mention of commissions or expressly disallowing them, commissions could subsequently be awarded. But it is claimed that a testamentary provision in favor of executors in lieu of the statutory compensation is substantially a legacy, and that, in the absence of any direction by the testator that such legacy shall be taken at any particular time, and that, failing to take it at the time specified, the executors shall be thenceforth estopped from claiming it at all, they may claim and retain it at any time while they have funds in their hands applicable to that purpose. I think there is much force in this contention. This testator says, at

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the close of the 18th clause of his will, "I authorize them" (the executors) "to receive from my estate the following commissions, namely" (then follows the scheme of allowances) "such commissions to be in full for such services and the amount to be divided among my executors *from time to time* equitably in proportion to their respective services."

Under these circumstances, I do not think it can fairly be claimed that the decree by which the fifth account was settled was an adjudication that the sum which appeared by such account to be charged as commissions was all the compensation to which the executors were then entitled, or that that decree affords any protection to these objectors against a present allowance as commissions of any sum, in addition to the sums whose retention was by that decree sanctioned, which the executors can now show themselves entitled to receive.

I am also of the opinion that, if the relief claimed by the executors can properly be granted, it may be given by the decree to be entered upon the present accounting, and without opening the decree entered upon the last.

Whatever right the executors may have to commissions upon the real estate partitioned among the devisees springs from the provision of the will which allows them "on the proceeds of the *sale* of real estate one per cent. of the amount received." While under some circumstances and for some purposes such a disposition of realty as was here effected might be regarded as a sale, it cannot, I think, be so regarded for the purposes now under consideration.

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By the 11th article of his will, the testator gives all the rest and residue of his estate, real and personal, to his children in equal shares, subject to certain powers and directions in the will contained. Among those powers is the power which article 12 confers upon the executors; that of managing the share of each child during his minority. In article 14, the testator says: "I authorize and empower my executors to make, sign, seal, acknowledge and deliver any and all deeds and conveyances which may be necessary in order to carry into full effect any division they may make" (*i. e.*, among the children) "or to declare or evidence the same, or in order to sell and convert into money or personal property any part of my real estate."

I think that, by this language, a clear distinction is made between the authority of these accounting parties to execute conveyances for the purpose of carrying into effect a division *in specie* among the children, and their authority to execute such conveyances after the sale of real property and its conversion into money or personal securities. And I hold that one per cent. commission on the proceeds of sale of real estate were not earned by the action of the executors in allotting such real estate among the devisees.

In January, 1887, the Surrogate filed the following opinion, in the matter of the same estate:

THE SURROGATE.—The fourth account of the executors and trustees of this estate was settled by a de-

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cree entered on April 30th, 1880, and the fifth by a decree entered on June 29th, 1885. The former sanctioned the retention by the accounting parties of the sum of \$9,339.59 as compensation to which, under the testator's will, they had become entitled for their services. The latter sanctioned a similar retention for a like cause of the sum of \$10,506.66. None of the parties interested in the estate made any objections to these credits. Upon the sixth accounting of the executors and trustees, which went into decree on December 6th, 1886, their claim to compensation was challenged and was in part disallowed.

I am now asked to "correct" the decrees of 1880 and 1885, upon the ground that the sums therein allowed the executors for their services were in excess of the sums to which they would have been found entitled, upon application of the tests established by the referee and the Surrogate upon the sixth accounting.

The executors have asked and obtained leave to resign and have now filed an account of their management of the estate since October 25th, 1885, wherein they claim commissions in the sum of about \$4,000. It is insisted that, without formally opening or setting aside either of the decrees complained of, the alleged overpayments may be rectified by a present disallowance of commissions in an amount equal to such overpayment. In my memorandum of August 14th, 1886, I intimated that if the executors, who had theretofore asked to be allowed commissions on certain transactions covered by previous accountings upon the ground that they had not retained all that they were entitled to claim, were correct in their contention, the

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relief prayed for might be granted, even without opening the decrees by which the former accounts had been settled; and this, because in view of the special directions of the will regarding their commissions, whereby they were permitted to retain them "from time to time," the allowance of such retentions as were sanctioned by those decrees could not be taken as an adjudication that the sum contained was *all* to which the accounting parties were entitled. It by no means follows that a *disallowance* of any sums heretofore withheld, the withholding of which has been approved by the Surrogate, can now be lawfully effected, until the decrees adjudicating that approval shall have first been opened or vacated.

Now, the moving party herein has not made out a case which will justify any interference with either of the decrees that he assails. The Surrogate has authority, under subd. 6 of § 2481 of the Code of Civil Procedure, to "open, vacate, modify or set aside a decree or order of his court." But the powers thus conferred, the section proceeds to say, "must be exercised only in a like case and in the same manner as a court of record and of general jurisdiction exercises the same powers."

There is no proof that the provisions sought to be corrected, even assuming them to be erroneous, were fraudulently or collusively inserted, or are the result of clerical errors, accident or irregularity, or that failure to object to their inclusion in the decrees was due to the excusable negligence of the party now claiming to be prejudiced. His contention simply amounts to this: that the compensation allowed the executors

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on the fourth and fifth accountings was allowed upon an erroneous theory of law. This will not suffice (Yale v. Baker, 2 *Hun*, 468; Dorke v. McClaran, 41 *Barb.*, 491; Decker v. Elwood, 3 *T. & C.*, 48; Sipperly v. Baucus, 24 *N. Y.*, 46; Melcher v. Stevens, 1 *Dem.*, 123; Munroe's Estate, 15 *Abb. Pr.*, 363; Brick's Estate, 13 *Abb. Pr.*, 12, 36; Matter of Tilden, 98 *N. Y.*, 434; Wright's Accounting, 10 *Abb. Pr. N. S.*, 429; Story v. Dayton, 22 *Hun*, 450; Singer v. Hawley, 3 *Dem.*, 571; Matter of Hawley, 100 *N. Y.*, 206; Farmer's Loan & Trust Co. v. Hill, 4 *Dem.*, 41).

The application must, therefore, be denied.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—August, 1886.

MATTER OF HOPPER.

In the matter of the estate of ANDREW HOPPER, deceased.

A Surrogate's court has jurisdiction to take the proof of a will of a non-resident decedent, in a case where, since his death, a promissory note executed, and secured by a mortgage on land situated in another State has come into its county and remains unadministered (Code Civ. Pro., §§ 2476, 2478).

APPLICATION, by proponent of decedent's will, for leave to withdraw same from the files of the court.

NELSON ZABRISKIE, *for petitioner.*

FRANCIS M. EPPLEY, *for R. G. Hopper.*

LEWIS S. BURCHARD, *special guardian.*

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THE SURROGATE.—There has been propounded for probate in this court a paper purporting to be the last will and testament of this decedent. The special guardian of certain infant next of kin has filed objections in which one of the jurisdictional facts alleged in the petition, to wit—the residence of decedent in this county—is denied. The proponent now asks leave to withdraw the alleged will from the files of the court, and has presented affidavits tending to show that she may have been mistaken in alleging in her petition for probate that the decedent at the time of his death was a resident of New York. If the jurisdiction or non-jurisdiction of this court depended solely upon the question whether the decedent was or was not a resident of this county, I should feel disposed to grant this motion. That the court has the power so to do, see *Heermans v. Hill* (2 *Hun*, 409). But it is alleged in the petition for probate that the decedent left certain personal property which has since his death come into this county. This would suffice to give the Surrogate jurisdiction if the deceased was a non-resident of the State (subd. 3, § 2476, Code of Civil Procedure). And I understand it to be conceded that, unless at the time of his death he was a resident of this county, he resides without the State. The personal property of the decedent that has come into this county is a promissory note executed in Georgia and secured by a mortgage upon lands in that State. Section 2468 of the Code expressly declares that, for jurisdictional purposes, a debt represented by a promissory note shall be regarded as personal property at the place where the note is. Before the enactment

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of the 18th chapter of the Code, it was held by the Court of Appeals in *Beers v. Shannon* (73 *N. Y.*, 292), that a bond for the payment of money was to be deemed an asset in the county in which such bond might be, notwithstanding the fact that neither the obligor nor the obligee was a resident of that county. Now that the Code not only in § 2478, *supra*, but in § 648, puts promissory notes on the same footing with bonds, I think it must be considered as the settled policy of the law of this State that such instruments are to be regarded as property in themselves, and not simply as evidences of debt. See notes to §§ 648 and 2478 in Mr. THROOP's edition of the Code. There seems to be no doubt, therefore, that this court has jurisdiction of this controversy, and no reason for allowing the paper propounded to be withdrawn, and the probate proceeding to be discontinued, unless all parties in interest assent. Some of them object.

The motion must, therefore, be denied.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—August, 1886.

MATTER OF PEYSER.

*In the matter of the estate of DAVID M. PEYSER,
deceased.*

The per diem allowance which, under Code Civ. Pro., § 2562, the Surrogate may award to an executor or administrator, for counsel fees in prepar-

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ing his account, is not intended to compensate the accounting party for his personal services in such preparation, but is to enable him to secure legal assistance and advice when needed for putting the account into proper form.

An executor is liable for interest on commissions retained without judicial allowance.

An executor who employs and pays counsel for legal services in the course of his administration will not be reimbursed out of the funds of his testator's estate, unless a proper regard for the interests thereof seemed to make such services necessary at the time when they were invoked.

The responsibility of an executor for paying, without protest, a doubtful claim of the U. S. government—declared.

HEARING of exceptions to report of referee, to whom were referred the account, and objections thereto, of the executor of decedent's will, in proceedings for judicial settlement.

CHARLES WEHLE, *for executor.*

SCUDDER & CARTER, SALOMON & DULON, TOWNSEND, DYETT & EINSTEIN, HENRY WEHLE, ABRAM KLING, C. BAINBRIDGE SMITH, and S. MERRIHEW, *for other parties.*

THE SURROGATE.—I shall pass upon the several exceptions to the findings of the referee herein in the order in which the referee discusses in his report the matters to which such exceptions relate.

First. The finding in respect to the form of the executor's account as it was originally presented is important only as it affects the question of costs and counsel fees to be awarded him in the decree to be entered in this proceeding. The per diem allowance, which under section 2562 of the Code of Civil Procedure the Surrogate may in his discretion award an executor or administrator for counsel fees in preparing his account, is not intended, it seems to me, to compensate the accounting party for his personal services

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in such preparation. For such services he is supposed to be rewarded by his statutory commissions. It is the purpose of § 2562 to enable him without personal expense or loss to secure legal advice and assistance whenever such advice and assistance are needed for putting his account into proper form.

The referee has found that this executor was justified in presenting his account as it was originally filed. If by this finding he means that the executor did not, by pursuing that course, subject himself to a penalty, I agree with him. No one of the contesting parties is now in a position to claim that costs should be charged against the executor because of the incomplete fashion in which he disclosed at the outset his dealings with this estate. It was in the power of any person, who was dissatisfied with that showing, to apply to the Surrogate for relief before the submission of the account to a referee. No such application was made, and no objector therefore can be sustained in contending that the expense attendant upon the reformation which was subsequently found to be necessary should be borne by the executor personally. It does not follow, however, that the accounting party should now be treated, as regards his claim for costs and counsel fees, as he would have been entitled to be treated if his account as first presented had been sufficiently explicit. He might well, it seems to me, have separated in the beginning the *corpus* of the estate from the income. It would very likely have happened that the referee or the Surrogate might have directed a transfer of items of the account from one schedule to another or the striking out of other items altogether,

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but the executor should in the first instance have rendered, according to his best judgment, some portion at least of the services which have here been practically performed by the referee. The question raised by this exception will be further and more particularly considered upon the settlement of the decree.

* * * * *

Third. I sustain the referee in his findings that the executor is entitled to a single commission only upon the *corpus* of the estate, and that he was not entitled to retain such commissions before their allowance by the Surrogate. But I hold in opposition to the referee that he must be charged with interest upon commissions improperly retained.

* * * * *

Serenth. Certain objections to the probate of this testator's will were filed upon its presentation for probate, but these objections were subsequently withdrawn and the will was established without controversy. In anticipation of a contest the executor had employed counsel and made preparation for trial. The attendant expense is found by the referee to be a charge upon the principal estate alone. When the executor's account was first submitted, objection was interposed to his claim to be credited with this disbursement upon the ground that it was excessive in amount. That objection was afterwards withdrawn, but the objectors now insist that the life estate should bear a part of this burden.

The evidence discloses that when the sum in question was paid by the executor to his counsel the latter agreed to render legal service in all matters relating

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to the estate that might subsequently present themselves in the course of its administration, and to claim no compensation therefor except as regarded proceedings in the courts. It also appears that, from time to time thereafter, the executor frequently sought and obtained the advice of his counsel in unlitigated matters. No charge seems to have been made for these consultations during the continuance of the life estate. It is not to be presumed that the services of counsel were rendered gratuitously, and as one of the considerable items of his first bill was his charge for a retainer, I cannot avoid the conclusion that some portion of the amounts received by him should be charged against the life estate. I do not find in the testimony the requisite *data* for making a proper apportionment, and unless some basis for such apportionment can be agreed on, there must be a further investigation of this matter before the referee.

Eighth. At the time of the testator's death, there was in force a law of the United States (sections 124 and 125, act of June 30th, 1864, as amended by act of July 13th, 1866, 14 U. S. Stat. at Large, 140), under which legacies of personal property passing by will to a person who was a stranger to the blood of a testator, were subject to a tax of six per cent., to be paid by his executor. This tax was declared by the statute to be "due and payable whenever the party interested in such legacy should become entitled to the possession or enjoyment thereof," and the statute further provided that such tax should be "deducted from the particular legacy," on account of which the

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same should be charged. By the act of July 14th, 1870, the tax referred to was repealed from and after the 1st day of October of that year. In September, 1870, the Commissioner of Internal Revenue issued instructions to his subordinates to the effect that a legacy passing from a person dying before October 1st, 1870, became subject to tax whenever the legatee had or should become entitled to possession thereof. This interpretation of the statute was afterwards sustained by the District and Circuit courts of the United States for this district, but was subsequently overruled by the Supreme court of the United States (*Mason v. Sargent*, 104 *U. S.*, 689).

The law was thus settled, that where a legatee under a will had not become entitled in possession before the 1st day of October, 1870, no tax could be collected on account of his legacy. On the 8th day of October, 1875, the day of the death of the testator's widow, Mrs. Brandis, an adopted daughter of the testator, but a stranger in blood, became under his will entitled in possession to a legacy of \$15,000. A collector of internal revenue demanded from the executor as a tax upon the legacy the sum of \$900. After some objection and delay the executor paid it. The referee has found that he is entitled to credit for such payment out of the testator's principal estate, notwithstanding the positive provision of the United States statute that the tax upon a legacy should be deducted from the legacy itself. It is urged by the executor's counsel that this charge against the principal estate should be sustained because the amount in

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question was paid to prevent proceedings which the internal revenue officers threatened to take against the executor, the prosecution of which proceedings would, it is claimed, have been seriously detrimental to the estate. The only penalty that the executor would have incurred by lawful resistance to the claim of the Government was a penalty not exceeding \$1,000, which might have been imposed on him personally. If he had taken the precaution to pay the alleged tax under protest, and had seasonably presented a claim to the Commissioner of Internal Revenue for its refunding, the United States would, of course, have returned the amount paid after the decision of the Supreme court that its payment had not been lawfully exacted. It is perhaps not too late even now for the executor to take steps which will enable him to recover this \$900.

After much hesitation, I feel compelled to find that under all the circumstances he was not warranted in making the payment without protest, and that having made no proper effort to recover the amount paid, he cannot be allowed credit therefor in his accounts. It is clear that to take this \$900 from the legatee would be unjust. She was not consulted in the premises and gave the executor no instructions; he cannot be treated as her agent in making the payment. She was entitled to the entire legacy of \$15,000 given her by the testator. That legacy was never subject to a tax, and she should receive it without abatement. The referee does not state the reasons for his conclusion that the \$900 should be charged to the principal

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estate. Counsel for Mr. Brandis suggests some considerations why that course should be pursued. But while I have no reason to doubt that the executor acted in good faith, it would, I think, be more just and equitable to refuse to credit him with this disbursement than to charge it to any of the beneficiaries under the will.

* * * * *

With the foregoing modifications, the referee's report is confirmed.



NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.— August, 1886.

MATTER OF ROSENFELD.

In the matter of the estate of CAROLINE ROSENFELD, deceased.

The docketing of a judgment rendered against an executor in an action brought against the decedent in his lifetime, upon a debt of the latter, does not preclude the creditor from petitioning for a disposition of decedent's real property, under Code Civ. Pro., § 2750, which deprives "a creditor, by a judgment which is a lien upon" such property, of the right to institute a special proceeding for such a purpose.

An inquest is "a trial upon the merits," within the meaning of Code Civ. Pro., § 2756, making a judgment rendered upon such a trial presumptive evidence of the debt, for the purposes therein specified.

The will of testatrix provided: "After all my just debts and funeral expenses are paid out of my estate by my executors, I give and bequeath" certain pecuniary legacies; bestowed one half of the residue of the

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estate, both real and personal, upon A., absolutely, and the other half upon A. and B., "after the payments, divisions and bequests as aforesaid," in trust for a purpose stated ; and empowered the executors to sell the whole or any part of the real and personal estate, ordering them to invest the proceeds, or sell any securities, as might seem most proper for carrying into effect the "provisions of this will."—

Held, that the real property was expressly charged with the payment of debts, and subject to a valid power of sale for that purpose, and therefore could not be disposed of by virtue of a decree of the Surrogate's court (Code Civ. Pro., § 2759).

PETITION by alleged creditor, for disposition of decedent's real property for payment of debts.

LOUIS COHEN, *for creditor*.

H. E. FARNSWORTH, *for heir*.

BERNARD METZGER, *for executors*.

THE SURROGATE.—The will of Caroline Rosenfield was admitted to probate in August, 1884. On April 2d, 1885, Jacob Wallach, claiming to be a creditor of her estate, commenced proceedings under title 5, of chapter 18 of the Code of Civil Procedure for the disposition of her real property.

He alleged in his petition the death of the testatrix, her indebtedness, his commencement of an action against her in her lifetime on account of that indebtedness, the pendency of such action at her decease, its subsequent revival against her legal representatives, and the recovery of a judgment against them for about \$2,500. He further alleged that the amount of personal property of the decedent in the hands of her executors was insufficient to satisfy such judgment, and prayed for a decree directing the disposition of so much of the real property of which the testatrix died seized as would be sufficient for the

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debts. To this petition answers have been filed by the executors and by one of the legatees. It is alleged by such answers that the judgment against the executor was not based upon the merits, and it is denied that the executor's estate is inadequate to satisfy the claims of creditors. It is also alleged that the matter is pending before a referee and an account is being taken in the course of which it is expected that the alleged allegation will be fully demon-

strated. The provisions of decedent's will are the following: "I give, devise and bequeath unto my dear daughter, Dora, after all my just debts and funeral expenses paid out of my estate by my executors, the sum of \$10,000, and I give and bequeath," etc. Then certain pecuniary legacies amounting to \$10,000.

Then, "I give, devise and bequeath unto my dear daughter, Dora, one half part of all the real and personal estate I own and hold at the time of my death, and the remainder of my estate, both real and personal, to have and to hold the same to her and to her heirs and assigns forever. I give, devise and bequeath unto my said daughter, Dora, and to her son, Moses, the remaining one half part of all the real and personal, *after the payment and bequests as aforesaid*, in trust for the use and behoof of my said son, David, for his own proper use, maintenance for his life," with remainder,

and the use of the will is as follows: "I authorize and empower my said execu-

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tors to mortgage or otherwise encumber my said estate, real or personal, if they deem it for its interest so to do, and in their discretion to sell or dispose of the whole or any part of my real and personal estate, and to execute and deliver good and sufficient deeds of conveyance therefor to the purchaser or purchasers thereof, and I order and direct my said executors to invest the moneys arising from the proceeds of such sale, or sell any such securities, as in their judgment and discretion may seem most proper for carrying into effect *the provisions of this will* and the trusts thereby created."

It is insisted by counsel for the executors, and by the special guardian of certain infant legatees, that, upon the above stated facts, the petition should be dismissed for several reasons—

1st. It is claimed that, as half of the residue of the estate is given to the executors, the judgment obtained against them, as executors, is a lien against the decedent's real estate within the meaning of § 2750 of the Code. I think otherwise. The lien referred to in that section is such a lien as attached during the life of the decedent herself. The mere entry and docketing of the petitioner's judgment is not of itself, therefore, a bar to this proceeding.

2d. It is urged that the judgment in question was not rendered after a trial upon the merits within the meaning of § 2756. This contention I think unsound. The papers show that an inquest was taken and the plaintiff must have been required to prove all the material allegations of his complaint which were

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denied by the answer. This would constitute a trial on the merits.

3*d*. The respondents suggest that, under the circumstances here disclosed, the granting of the petition should in any event be delayed until the determination of the pending accounting proceeding. If I did not feel bound to deny the application altogether, I should adopt this suggestion. Section 2759, subd. 5, provides that a decree directing the disposition of a decedent's real property shall not be entered until the Surrogate shall have been made satisfied that all the personal property "which could have been applied to the payment of debts has been so applied." There is no better or more expeditious way of ascertaining the facts in this regard than by pushing to a close the proceeding for accounting.

4*th*. But I am convinced, upon full consideration of these matters, that by the terms of the will the property sought to be disposed of is expressly charged with the payment of debts, and is subject to a valid power of sale for that purpose (*White v. King*, 7 *Civ. Pro. Rep.*, 267; *Dennis v. Jones*, 1 *Dem.*, 80; *Lupton v. Lupton*, 2 *Johns. Ch.*, 614; *Reynolds v. Reynolds*, 16 *N. Y.*, 367, and cases cited).

Under § 2759 of the Code, this petition must, therefore, be dismissed altogether.

MATTER OF M'COSKRY.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—August, 1886.

MATTER OF McCOSKRY.

In the matter of the estate of CATHARINE M. McCOSKRY, deceased.

A party to a probate proceeding, who seeks to obtain the testimony, before trial, of an aged, sick or infirm witness, residing and being in the county where the same is pending, must proceed under Code Civ. Pro., § 2539, and cannot insist upon taking a deposition before a referee, as provided in id., §§ 870-886.

APPLICATION for examination, *de bene esse*, of witness, in proceedings for probate of will.

MANLEY A. RAYMOND, *for proponent.*

JACKSON & INGRAHAM, *for contestant.*

THE SURROGATE.—There is pending in this court a controversy over the probate of a paper that has been propounded as the last will and testament of Catharine M. McCoskry, deceased. The case has not yet been reached upon the calendar. An application was lately made on behalf of the contestant for the examination, *de bene esse*, of one Angeline E. Skidmore, a resident of this city, upon the ground that she was so sick and infirm as to afford reasonable ground for the apprehension and belief that she would not be able to attend the trial of the issues of the proceeding for probate. It was claimed by counsel for the proponents of the alleged will that the provisions of the Code of

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Civil Procedure, authorizing the taking of depositions of sick and infirm witnesses, had no application to probate controversies in Surrogates' courts.

Section 2538 of that Code declares that §§ 870 to 886 inclusive shall apply to Surrogates' courts, except where a contrary intent is expressed in, or plainly implied from, the context of the provisions of the 18th chapter. The sections in question relate to the taking of depositions within the State, for use within the State.

Section 872 provides that one who desires to take, for use in a pending action, the deposition of a person not a party to such action, may present to the Judge of the court in which such action is pending an affidavit setting forth the reasons why the deposition is desired. If it is made to appear that the person sought to be examined is so sick or infirm as to afford reasonable grounds to believe that he will not be able to attend the trial, an order may be made for his examination.

Now, is the inapplicability of §§ 870-886 to a case like the one at bar "expressed in or plainly implied from" § 2539? That section declares that upon the application of a party to a special proceeding, and upon proof by affidavit, to the satisfaction of the Surrogate, that the testimony of a witness in his county, who is so aged, sick and infirm as to be unable to attend before him to be examined, is material and necessary to the applicant, the Surrogate *must*, where the special proceeding was instituted to procure the probate or revocation of probate of a will, and in any other case, may, in his discretion,

proceed to the place where the witness is, and there, as in open court, take his examination. I think that the question I have asked must be answered in the affirmative.

One who seeks to obtain in a probate proceeding the testimony of an aged, sick, or infirm witness residing and being in this county, must adopt the procedure provided by § 2539 (*supra*), and cannot insist upon taking the deposition of such person before a referee.

It appears, by the affidavit submitted since the motion was made, that the person whose examination the moving party seeks, has left this city and is in the county of Saratoga. I am asked to appoint a referee for taking her testimony in that county. This application must be denied. Within the limitations of § 2540, it cannot properly be granted unless the Surrogate "has good reason to believe that the witness cannot attend before him within a reasonable time." Now, the ability of Mrs. Skidmore to go to Saratoga pending this application encourages me to believe that she may be able to return from Saratoga by the time this cause shall be called for trial.

The motion for her examination must, therefore, be denied.

MATTER OF BREWSTER.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—August, 1886.

MATTER OF BREWSTER.

In the matter of the estate of CHRISTOPHER S. BREWSTER, deceased.

The circumstances under which the public administrator of the county of New York may obtain letters of administration of a decedent's estate are prescribed by L. 1882, ch 410, § 227, and not by the Code of Civil Procedure.

That officer is not required to give notice of his intention to apply for such letters to a relative of the decedent who, though having a prior right to letters, is not actually entitled to a share in the estate.

Failure to give proper notice of such intention is not a jurisdictional defect, but a mere irregularity, of which none can take advantage except such as are entitled to the notice.

The public administrator is not required to file a petition for letters; and if he does, its allegations, though upon information and belief, are not deprived of the probative force prescribed by the statute.

As to whether one named as executor, and legatee, in an alleged will of a decedent not admitted to probate, has a sufficient interest in the estate to enable him to petition, under Code Civ. Pro., § 2685, for the revocation of letters of administration issued to the public administrator—*quære*.

MOTION by William C. Brewster, to revoke and cancel letters of administration of decedent's estate, granted to the public administrator.

B. F. EINSTEIN, *for the motion*.

ALGERNON S. SULLIVAN, *opposed*.

THE SURROGATE.—The public administrator in the city of New York was, on the 25th of April, 1885, appointed administrator of the estate of this decedent. The appointment was made upon his verified petition,

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which alleged upon information and belief that the decedent died intestate at Paris, France, in December, 1870, and that at the time of his death he was possessed of certain personal property in the county of New York. A nephew of decedent, whose father died while the decedent was yet living, has instituted proceedings for the revocation of the respondent's letters of administration. He insists that the Surrogate should not and would not have granted such letters but for the wilful suppression, by a person at whose instigation the public administrator is claimed to have acted, of the fact that, at the time the letters were applied for, there was in the county of New York a person entitled to notice of the application; for he claims that he himself, as a nephew of the decedent, and his nearest relative residing in such county, was a person so entitled.

The petitioner in instituting the present proceeding seems to have acted upon the notion that the respondent's right to letters of administration rests upon certain provisions of the Code, and that the Code prescribes the procedure which the respondent was bound to adopt in applying for letters. Such is not the case. The application was evidently made under §§ 16 and 17 of tit. 6; ch. 6, part 2, R. S. (3 Banks, 7th ed., 2312), as re-enacted in § 227 of the New York city Consolidation act of 1882 (L. 1882, ch. 410). As this statute was passed after the adoption of chapter 18 of the Code of Civil Procedure, it is clear that the provisions of §§ 16 and 17, *supra*, however they may have been affected by the enactment of that portion of the 18th chapter which regulates "the grant of let-

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ters of administration" (title 3, art. 4) have been in full force and effect since they were recognized and adopted as law by the Consolidation act. We must therefore look to § 227 of that statute, and not to the Code of Civil Procedure, for ascertaining the circumstances under which the public administrator may obtain letters of administration upon a decedent's estate. By virtue of § 27, title 2, ch. 6, part 2, R. S. (3 Banks, 7th ed., 2290), this petitioner was no doubt entitled, in preference to the public administrator, upon this decedent's estate, and if the application of the public administrator had been made under the Code of Civil Procedure, the petitioner would have been entitled to notice unless he had previously renounced his right to letters. It is expressly declared by the section referred to that the preference of the public administrator shall be subordinate to that of the next of kin of the deceased "who would be entitled to share in the distribution of the estate," and it has been held that this phrase "would be entitled" means *would be entitled in any event*. That is, in case there should be at the period of distribution no relatives having a superior claim (*Lathrop v. Smith*, 24 *N. Y.*, 417; *Butler v. Perott*, 1 *Dem.*, 9).

It does not follow, however, that by reason of his right to letters in priority over the public administrator, the petitioner was entitled to notice of the application upon which the letters were heretofore issued to that officer. Whether he was or was not so entitled must be ascertained by reference to § 227 of the Consolidation act. That section provides that the notice which the public administrator shall be required

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to give of his intention to apply for letters "shall be served personally on the widow and the relatives of the intestate entitled to any share in his estate, if there be any to be found in the city, at least thirty days before the time therein specified. If there be none to be found in the said city," the section proceeds to say, "and in all cases where the notice shall not have been personally served, it shall be published at least twice in each week for four weeks in some newspaper printed in the city." It will be observed that the relatives upon whom the notice is required to be personally served, if they can be found in the city, are "*the relatives of the intestate entitled to any share in his estate.*" Is the present applicant such a relative? He claims to be, and relies on the interpretation which the courts have put upon the language of the statute already referred to as establishing the order of priority in which letters of administration are granted in cases of intestacy. But the expression which is used in that statute is not "relatives entitled," but "relatives who *would be* entitled." "Administration in case of intestacy," says § 27 (*supra*) "shall be granted to the relatives of the deceased who would be entitled to succeed to his personal estate, if they or any of them will accept the same, in the following order"—then follows a specification of the order of priority of the widow and the kin of the intestate, concluding as follows: "Eighth. To any other next of kin who would be entitled to share in the distribution of the estate."

As has been intimated already, it was held in *Lathrop v. Smith* (*supra*), and subsequently in *Butler v.*

Perrott (*supra*), that the language, above quoted, when read in the light of the context, could not fairly be construed as confining the right of administration to such relatives of the intestate as were actually entitled to share in his estate; and that as against the claim of a stranger to the blood of the intestate, any one of the intestate's relatives, who might under any circumstances be entitled to participate in his personal estate would be entitled to letters. It seems to me that the language of § 227 can not fairly receive this literal interpretation, but that, on the contrary, it plainly and unmistakably contemplates the notification of only such relatives of the intestate as are actually entitled to a distributive share of his personal estate.

I hold, therefore, that the petitioner, although one of decedent's kindred whose claim to administration was superior to that of the public administrator, was not entitled to notice of the public administrator's application for letters. The statute under which that officer proceeded relieved him from the necessity of notifying the petitioner, as similarly by § 2662 of the Code of Civil Procedure, a resident of the State having a right to administration inferior to non-residents who are nearer of kin to a decedent is not required to cite such non-residents unless the Surrogate in his discretion shall so direct.

The conclusion that I have reached upon this question of notice must lead to the dismissal of the application before me, unless there was, as the petitioner claims, some jurisdictional defect in the proceeding for obtaining letters, because of which the Surrogate's

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action is absolutely void. I think there is no doubt that if any such defect exists the petitioner can avail himself of it. His preferential right to letters of administration entitles him to relief. The fact, if it be a fact, that the decree is a nullity would not preclude him from obtaining relief in the manner indicated (*Seaman v. Whitehead*, 78 *N. Y.*, 306).

It is claimed that, at the time the public administrator applied for letters, he did not in the manner prescribed by law give notice of such application to the children of the decedent who were residing in Europe, and that this omission is fatal to the validity of the proceedings, and to the jurisdiction of the court to entertain them. Assuming that there was such an omission—and as to whether there was or was not I express no opinion—it did not in my judgment produce the effect claimed for it. The court obtained jurisdiction by the presentation of the application and by the existence of the jurisdictional facts, the character of which will be presently considered, and failure to give notice of such application to any party whose right to letters was superior to the applicant's and who was entitled to notice, was a mere irregularity which did not vitiate the proceeding and of which advantage could be taken only by the party failing to receive notice (*James v. Adams*, 22 *How. Pr.*, 409; *People v. Waldron*, 52 *How. Pr.*, 221; *Johnston v. Smith*, 25 *Hun*, 171; *Kelly v. West*, 80 *N. Y.*, 139, 145).

The validity of the decree is further attacked upon the ground of the insufficiency of the petition to confer jurisdiction upon the Surrogate. The facts upon

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which the jurisdiction depended were the death of the decedent, his intestacy, and the presence in this county, at the time of his death or afterwards, of effects belonging to his estate (Subd. 1, § 219, ch. 410, Laws of 1882; Bloom v. Burdick, 1 *Hill*, 130; Bumstead v. Read, 31 *Barb.*, 661; James v. Adams, *supra*; Sheldon v. Wright, 5 *N. Y.*, 497; Farley v. McConnell, 52 *N. Y.*, 630; Roderigas v. East River Sav. Inst., 76 *N. Y.*, 316; Leonard v. Columbia Steam Nav. Co., 84 *N. Y.*, 48; Johnston v. Smith, *supra*).

Whether, at the time of his death, the decedent was or was not a citizen of this State is entirely irrelevant to the inquiry respecting the Surrogate's jurisdiction. It is clear that the limitations of § 220 of the Consolidation act have no application to subdivision 1 of § 219, the subdivision with which we are solely concerned in the case at bar. Section 220, in restricting the operation of subdivisions 3, 4 and 5, is obviously intended to prevent the public administrator from taking charge, in the cases therein specified, of the effects of decedents not citizens of the State, unless such decedents, or the goods of such decedents, have been "landed within the city of New York, or at the Quarantine near said city" (Suarez v. The Mayor, 2 *Sandf.*, 175, 180).

The law under which the administrator acted contains no provision requiring him to file a petition with the Surrogate, or prescribing the manner in which he shall bring to the attention of the Surrogate or that officer the facts necessary to set in motion his authority. A petition would naturally suggest itself as the

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most convenient and suitable method, and such method was adopted by the public administrator in the case at bar. The circumstance that the averments of that petition are upon information and belief does not make the paper ineffectual as the foundation of the proceeding whose validity is here assailed, or deprive such paper of probative force and effect. The petition was sufficient to justify the Surrogate in regarding the jurisdictional facts which it alleged as established, and in granting the letters which were thereupon issued.

The contestant strenuously insists that there was a failure to prove the decedent's intestacy, but the statute under which the public administrator was acting expressly provides that in a case of this character "intestacy shall be presumed until a will shall be proved and letters testamentary granted thereon." Even if the proofs furnished by the petition were insufficient, therefore, to make out a case of intestacy, this provision would have relieved the applicant from the necessity of submitting any such proof. That all the necessary jurisdictional facts were established before letters were issued is a proposition which finds support in the decision of the Court of Appeals in *Sheldon v. Wright* (*supra*). The petition there in controversy was substantially the same as the one here assailed, and was regarded as sufficient to confer jurisdiction. *Roderigas v. East Riv. Sav. Inst.* (*supra*) is not in conflict, but in harmony with *Sheldon v. Wright*. In delivering the opinion of the court in the later case, Chief Judge CHURCH said: "It is quite unnecessary in this case, and it is not intended,

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to hold that the fact that the Surrogate did not act, and the defective proof, would avail if the plaintiff had been dead, because then the Surrogate would have had jurisdiction over the subject matter, and subsequent irregularities and defects would not vitiate the proceedings so as to render them void."

The meaning of the language I have just quoted is made somewhat clearer by substituting "defect of" in place of "defective." This corrects what is probably a misprint; but however that may be, there can be no doubt that the court deliberately indicates its refusal to declare that even such a state of facts as was disclosed in the case there under consideration would have availed the appellants, if the alleged decedent had not been in fact alive.

The proceedings which resulted in the grant of letters are further attacked because of the alleged false and fraudulent character of the averments of the petition, and because of the alleged false suggestion of material facts contained therein. It is doubtful whether the petitioner is in a position to make this attack. I have declared that he was not entitled to notice of the commencement or pendency of the proceedings, and it is questionable whether the fact, that he is the executor and a legatee under the will of Seabury Brewster who was in his lifetime named as the executor and a legatee under an alleged will of this decedent, never as yet admitted to probate, entitles him to be regarded as a party so interested in this estate, within the meaning of § 2685 of the Code of Civil Procedure, as to enable him to avail himself of the provisions of that section. In view, however, of

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the disposition that I am about to make of this claim of false averments and suggestions, it will be unnecessary to determine this question of *status*.

I think that the only allegations respecting which the charge of fraud and falsehood can be material are those regarding the intestacy of the decedent and the presence of assets in this county belonging to him at the time of his death. The statute under which the public administrator brought his proceeding provides, as we have seen, that intestacy shall be presumed until a will of the decedent shall have been proved and letters granted upon it. Now, as no will of this decedent has ever yet been proved, the allegations of the petition respecting intestacy were in legal effect correct and true.

I do not understand it to be claimed that the decedent left no assets in this city at the time of his death, but it is insisted that a valid and effectual distribution of all his property had been made previous to the application for letters of administration under and in pursuance of a testamentary instrument executed by the decedent while residing in France. Whether this claim is or is not well founded can be determined by the Supreme court, in which is now pending an action brought by the public administrator to recover alleged assets of the estate. Until that determination shall have been reached, I shall not enter upon any investigation as to the truth or falsity of the allegations of this petition touching the existence of assets of this estate in New York county (*Pumpelly v. Tinkham*, 23 *Barb.*, 321, 323).

Petition denied.

MATTER OF CANT.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—August, 1886.

MATTER OF CANT.

In the matter of the estate of DAVID CANT, deceased.

In the absence of specific and express testamentary direction, allowing a trustee to invest trust funds upon personal security, such investment is improper, and, if made at all, is at the peril of the trustee to respond in case of loss.

The will of testator directed the executor to invest the funds that might come to his hands "in such suitable manner as may be for the best interests of my estate, to be determined by my said executor."—

Held, that this language could not be construed as conferring discretionary authority to invest in unsecured promissory notes.

King v. Talbot, 40 N. Y., 76—compared.

HEARING of exceptions to report of referee, to whom were referred the account, and objections thereto, of the executor of decedent's will, in proceedings for judicial settlement.

BYRON W. COHEN, *for executor.*

JESSE S. NELSON, *for objectors.*

WILLIAM B. DALL, *special guardian.*

THE SURROGATE.—The referee to whom this executor's account and the objections thereto were lately submitted has filed a report, to the confirmation of which certain exceptions have been interposed in behalf of the various parties to the controversy. One of these exceptions presents the question, whether a loan of about \$6,000, made by the executor from the funds of the estate to Groht & McLaren, a firm of commission merchants in this city, upon no other secu-

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urity than their promissory notes, was, as the referee has pronounced it, a legal and proper investment.

This loan was made in May, 1883, and the Groht & McLaren notes were, from time to time, renewed until, in July, 1884, the firm became insolvent and the notes worthless. Now, it is insisted by counsel for the contestants, and is indeed conceded by his adversary, that unless this executor was vested by his testator's will with extraordinary authority in the choice of investments, the loan here in question was unauthorized, and the loss occasioned by the failure of Groht & McLaren must be borne by the accounting party alone. The doctrine that, except under special circumstances, an executor has no right to risk, upon mere personal security, funds that his testator has entrusted to his management, and that an investment upon such security constitutes a breach of trust for which the executor is personally chargeable, is as well settled as any in the whole range of equity jurisprudence (Perry on Trusts, 3d ed., §§ 453, 460; Hill on Trustees, 378, 370; *Holmes v. Dring*, 2 *Cox*, 1; *Bogart v. Van Velsor*, 4 *Edw. Ch.*, 719; *Le Fevre v. Hasbrouck*, 2 *Dem.*, 567; *Mills v. Hoffman*, 26 *Hun*, 594; *Judd v. Warner*, 2 *Dem.*, 104).

But it is insisted that, by the will of this testator, his executor is given absolute discretion and authority in the choice of investments, and the referee has so found.

The will directs that the executor shall invest the funds that may come to his hands, "in such suitable manner as may be for the best interests of my estate, to be determined by my said executor." How can

be fairly construed as giving any broader authority than was conferred upon of Mr. King, whose will was under construction in *King v. Talbot* (40 *N. Y.*, 76). That his estate to his executors "entrusting its investment for the benefit of my as held by the Court of Appeals that the power of executors in selecting investments was not in the least enlarged by the testator."

As in the case at bar lays special stress upon the word "determined" which is employed by the testator in his direction touching investments; the court uses another word not inferior in authority and that is the word "suitable." It is held that the executors are to *determine* what forms of investments may be for the best interests of the estate, but the investments are, nevertheless, to be made in a *suitable* manner. In *Wilkes v. Cooper's Rep.*, 6) executors were directed by the testator's will to lay out a legacy in public securities or such other good security as they can think safe." The selection of personal investments was condemned, by Sir WM. GRANT, M. R., as unauthorized by the will.

In *v. Reddington* (5 *Ves.*, 794) an investment in personal security was held indefensible where the executors were directed to convert the estate into ready money, and place it in their care "into ready money, and place it at interest in their discretion."

In *v. Brimmer* (74 *N. Y.*, 539) executors were authorized by their testator's will to invest the

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proceeds of the estate in "lands, buildings, bonds and mortgages, or in such other securities as they shall deem safe and for the greatest benefit of my daughters." This was certainly very broad language, but not broad enough, it was held, to authorize the executors to make investments in mortgage bonds of a coal mining company.

The authorities above cited fairly support the proposition, that, in the absence of specific express directions allowing a trustee to invest trust funds upon personal security, such investment is improper, and if made at all is made at the peril of the trustee to respond in case of loss, as the Vice Chancellor said in *Bogart v. Van Velsor* (*supra*): "Good faith and honest intentions will not protect men in the performance of a trust, when they depart from prudential rules which the experience of others in similar transactions has approved as the only safe guides."

The contestant's exceptions as regards the Groht & McLaren loans must be sustained.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—October, December, 1886.

MATTER OF HENRY.

In the matter of the estate of JAMES G. HENRY, deceased.

The question whether costs, awarded in a probate proceeding, should be made payable by a party personally, or out of the decedent's estate,

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rests, under Code Civ. Pro., § 2557, in the sound discretion of the court. A defeated contestant should not be mulcted with proponent's costs, where his resistance may, from his standpoint, have seemed proper and necessary, in the interests of justice, and for the due protection of his rights.

Accordingly, where a decree was about to be entered, denying a petition for the revocation of probate of a will, and it appeared that petitioner had been advised by counsel that it was competent, in the proceedings instituted by him, to inquire into the validity of a divorce and a subsequent marriage of proponent, which matters were excluded by the court from consideration,—but for which ruling, petitioner might have succeeded in establishing his *status* as a contestant, and in his opposition to confirmation of probate,—

Held, that the costs awarded should be directed to be paid out of the funds of the estate.

Code Civ. Pro., § 2348, subd. 3., authorizing a Surrogate, in a probate proceeding, to “order a copy of the stenographer's minutes to be furnished to” an unsuccessful contestant's counsel, “and charge the expense thereof to the estate,” relates exclusively to the minutes of testimony taken in the course of actual trial in the Surrogate's court, and does not extend to the case of an expenditure for a stenographic report of an examination of a witness, *de bene esse*.

SETTLEMENT of decree, in special proceeding instituted for the revocation of probate of decedent's will.

F. H. CHURCHILL, *for executor*.

RICHARDS & HEALD, *for contestant*.

JOHN L. N. HUNT, *special guardian*.

THE SURROGATE.—The proceeding brought by Evan J. Henry for revoking the probate of this testator's will is about to be terminated by a decree denying the petition for revocation and confirming the probate. By that decree certain costs and counsel fees will be awarded the proponent, and provision will be made for compensating the services of the special guardian of James Griffiths Henry, Jr., the infant son of the testator.

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Shall these costs and allowances be directed to be paid out of the estate, or shall they be charged in whole or in part to the petitioner?

Section 2558 of the Code of Civil Procedure provides that, save for certain exceptions with which we are not here concerned, costs shall not be awarded out of a testator's estate, or otherwise, to one who unsuccessfully opposes the probate of such testator's will, or strives unsuccessfully to have such probate revoked. The award of costs in probate proceedings to any party not within this inhibition is regulated by the general provisions of § 2557. "Such costs," says that section, "may be made payable by the party personally or out of the estate or fund as justice requires." The evident intent of the legislature in absolutely forbidding the Surrogate to reward out of a testator's estate an unavailing opposition to the establishment of such testator's will, is very manifest. For ten years prior to the enactment of the present provision of the Code this court had been vested with such large discretionary authority as regarded the allowance of counsel fees in will controversies that however wisely and justly such authority was sought to be exercised, the fact that it could be exercised at all was provocative of reckless litigation. But the legislature while recognizing by its adoption of § 2553 the mischiefs of the system of costs and allowances by that section abrogated, has not seen fit to direct that by the mere act of fruitlessly resisting the probate or confirmation of probate of a will, a suitor not only forfeits all claim to the discharge of his own costs out of the funds of the estate, but becomes necessarily chargeable also

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with all other costs attending the controversy. It is apparent therefore that, in the contemplation of the legislature, cases may arise in which an unsuccessful opponent of a will would be treated unjustly if required to bear the entire burden of costs upon his own shoulders. It has been the practice of the present Surrogate to refuse so to condemn a defeated contestant, unless by the disclosures of the trial itself, or by some other means, it has been made to appear that such contestant has acted *mala fide* or vexatiously, and without grounds of opposition which might reasonably have seemed to him to be fair and just. A defeated contestant should doubtless be charged with costs where his resistance has been wanton or malicious or clearly unfounded, but not with a resistance based upon what, from his standpoint, may have seemed proper and necessary in the interests of justice, and for the due protection of his rights. This is a proposition which seems to me to be supported by *Broadbent v. Hughes* (29 *L. J. [N. S.]*, *P. M. & A.*, 29); *Summerrell v. Clement* (3 *Sw. & Tr.*, 35); *Robins v. Dolphin* (1 *Sw. & Tr.*, 318); *Nichols v. Binns* (*id.*, 239); *Seaton v. Sturch* (20 *L. J. [N. S.]*, *P. & M.*, 195); *Mitchell v. Gard* (3 *Sw. & Tr.*, 375).

The question of charging costs to a defeated contestant is one which addresses itself to the sound discretion of the court. It is in the very nature of things impossible that the exercise of this discretion can be controlled by any precise and definite rule. "No positive regulation could be established," said *Wilde, J.*, in the case last cited, "that would bear the strain put upon it by the justice or hardship of partic-

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ular instances. But if there be sufficient and reasonable ground, looking to the knowledge, or means of knowledge, of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent."

This seems to me to be a sound and sensible doctrine. For, as the learned Judge points out, it is in the interests of justice that doubtful wills should not pass unchallenged to probate merely because a contest, in case it should prove unsuccessful, would entail upon the contestant a grievous burden of costs ; while, on the other hand, it is equally in the interests of justice that persons should not be tempted into unwarrantable will controversies by reflection that however such controversies may result, the attendant expense is sure to be defrayed, in whole or in part, out of the funds of the decedent's estate.

Now, under what circumstances does this question respecting costs arise in the case at bar ?

The proponent of this will, who was formerly the wife of one Simmons, obtained a divorce from him in December, 1881. In January, 1882, she was married to this testator, who died in 1883, leaving one child the fruit of such marriage. In October, 1883, the testator's will was admitted to probate in this county. Within the year then next ensuing the father of the testator commenced this proceeding for revocation of probate, charging, among other things, that the proponent by the exercise of fraud and undue influence had procured the making and execution of

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the will, and alleging also that James Griffiths Henry, Jr., was not the son of the testator and his next of kin, and that the proponent was not the testator's lawful wife, but that at the time of her marriage to the testator, and at the time of his death, she was the lawful wife of one Simmons, and that the decree of the Supreme court, by the provisions whereof she had been divorced from Simmons, was fraudulently and collusively procured, and was therefore invalid and of no effect. The petitioner insisted that he was himself his son's only next of kin, and that he was entitled as such to dispute the validity and legality of the will. In November, 1885, the Surrogate directed that the preliminary issue as to the *status* of the petitioner, the validity of the proponent's marriage to the decedent, and the legitimacy of their infant son, should be presented and determined before the petitioner could be permitted to attack the will. The direction was adhered to in December, 1885, when a motion was made in behalf of the petitioner that all the issues "be heard and passed upon together, and not separately." At the same time the Surrogate denied an application of the petitioner for an order directing the examination by commission of certain witnesses who it is claimed could give material testimony tending to show that the proponent was not the decedent's widow. These decisions were put upon the ground that the petitioner could not, in the revocation proceeding, be allowed to impeach the validity of the decree by which the proponent was divorced from Simmons, except by evidence showing that the court in which that decree was entered

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was without jurisdiction to pronounce it. And it was held further that the petitioner could not be allowed to offer evidence tending to impeach the marriage between the decedent and the proponent upon the ground of any force, duress or fraud employed by the latter in bringing such marriage about. The petitioner appealed from the order denying the application for the issuing of commissions and from the order denying the motion to try the issues simultaneously. It was claimed by his counsel that those appeals operated as a stay of proceedings; but the Surrogate held otherwise, and directed that the trial of the preliminary issue should proceed. The petitioner thereupon entered into a stipulation that in the event of the affirmance of the orders in question or the dismissal of the appeals, a decree denying his petition should straightway be entered.

Subsequently, the appeals were abandoned, and the petitioner now interposes no obstacle to the confirmation of probate. The affidavits submitted by his counsel, to support his protest against the proponent's claim that he should be condemned in costs, satisfy me that the petitioner verily believed and had reasonable ground for believing that his contest of the will might be successful. He was advised by eminent counsel that in the revocation proceeding he could cause an inquiry to be instituted into the validity of the proponent's divorce from Simmons, and her subsequent marriage with the testator, and that the probable result of that inquiry would be the ascertainment that the testator had never been lawfully married. I have held that the counsel who gave this

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in believing that the Simmons brought in question. If I had possible that the petitioner might blishing his *status* as contestant, succeeded in his opposition to probate. It would be treating him in costs for following the o were, I doubt not, persuaded is just, and would be sustained. charged with bad faith in alto-stantiate the allegation of his, even if the marriage between he decedent were concededly

Henry, Jr., was not their son. making this allegation was prob-

Mr. Keasby's letter of June 13, Keasby) "thought it evident" th Mr. Lowell, "that the child ole matter of issue a part of the against your" (the petitioner's)

was verified on the 17th of may well be that the petitioner /'s suspicion to be well founded red that it could not be substan-

ht not to have been made; but se does not merit the penalty ed to visit it. My conclusion s that such costs and allowances ould be paid out of the funds of

MATTER OF HENRY.

THE following opinion was filed, in the same matter, in December, 1886 :

THE SURROGATE.—The unsuccessful petitioner for the revocation of the probate of this testator's will asks, by his present application, that he be allowed out of the assets of the estate the sum of \$203.42, "as and for his expenses for stenographer's minutes."

Subd. 3 of § 2558 of the Code of Civil Procedure provides that, in probate controversies, "the Surrogate may order a copy of the stenographer's minutes to be furnished to the contestant's counsel and charge the expense thereof to the estate, if he shall be satisfied that the contest is made in good faith."

In view of this provision and of the opinion expressed in my memorandum of October 4th, 1886, I should feel bound to allow the petitioner out of the assets of the estate for any reasonable and proper expenses incurred by him in obtaining a copy of such "minutes" as are referred to in §§ 2541, 2542 and 2543 of the Code ; and of such only. Those sections relate exclusively to minutes of testimony taken in the course of the actual trial of a proceeding in the Surrogate's court.

Now, it is not disputed that \$174.12 of the \$202.42 disbursed by the moving party herein was expended by him for a stenographer's report of the examination, *de bene esse*, of one Catharine Moore. That deposition was not read in evidence at the trial and was not "returned" in the manner provided for by § 880 of the Code. Nor was the way paved for its introduction in evidence by proof that the deponent had died, or that she was absent from the State, or unable to

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attend the trial by reason of her confinement in prison or jail, or because of insanity, sickness or other infirmity.

For these reasons, it is plain that to the extent of \$174.12 the application of the moving party must be denied. I have some doubt whether he is not precluded by the stipulation of February 24th, 1886, from claiming reimbursement for the sum of \$28.30 paid the stenographer for a copy of the testimony actually taken at the trial; but I have concluded to allow him that amount out of the assets of the estate.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—October, 1886.

MATTER OF POWELL.

In the matter of the estate of SARAH L. POWELL, deceased.

The will of testatrix named no executor, and no residuary legatee. The subscribing witnesses, however, testified to declarations, made by testatrix, of a wish that C., one of the principal legatees, and one of two rival applicants for letters of administration, *c. t. a.*, should be entrusted with the enforcement of the provisions of the will.—

Held, that, *ceteris paribus*, the preference so expressed was entitled to weight in making the selection, and that C. should be appointed. A relative of a decedent, who is also a resident of this State, will be preferred, as an applicant for letters of administration, *c. t. a.*, of her estate, to a non-resident stranger in blood.

APPLICATION for probate of decedent's will, and for

MATTER OF POWELL.

grant of letters of administration with the same annexed.

WILLIAM H. SAGE, *for proponent.*

JOHN W. WEED, *for contestant.*

THE SURROGATE.—A decree may be entered admitting to probate the paper heretofore propounded as this decedent's will.

I decline to charge the contestant with costs. The trial has not been unreasonably delayed, and no witnesses have been examined except the subscribing witnesses to the will. Within my recent decision in *Matter of Henry* (*ante*, 272), justice does not require that the contestant should be personally charged with the proponent's costs.

The will appoints no executor or executrix. By the provisions of § 2643 of the Code of Civil Procedure, letters of administration, *c. t. a.*, must issue, in such a case: 1st, To one or more of the residuary legatees qualified to act, and in default, etc., 2d, To one or more of the principal or specific legatees so qualified.

There is no residuary legatee under this decedent's will. The principal and specific legatees are Anna M. Smith, Mary C. Case, Louise C. Wilson, Sarah L. Smith and Isabella C. Fish. Anna M. Smith and Mary C. Case are rival applicants for letters. Which of the two has the greater interest in the estate is not altogether clear. If there were any considerable disparity in the extent and value of their respective claims as legatees of the effects to be administered, that cir-

MATTER OF POWELL.

cumstance might be regarded as controlling (*Quintard v. Morgan*, 4 *Dem.*, 168).

Counsel for Mrs. Case has presented affidavits made by the two subscribing witnesses, Hattie A. Hatch and Agnes F. Smith. The former, who is the manager of Hahnemann Hospital, in this city, drew the will. She declares that the importance of inserting a provision for the appointment of an executor did not occur to her, but that the testatrix expressly stated that she wished nobody except her niece, Mrs. Case, to have anything to do in the management of her estate. The other subscribing witness, Agnes F. Smith also bears testimony to the fact that the decedent expressed a wish that to Mrs. Case should be entrusted the enforcement of the provisions of this will.

I am not aware that, in any reported case, the selection of an administrator, *c. t. a.*, from among several persons having equal rights under the statute has been made to depend upon the declared preference of the testator. But I think that, other things being equal, such preference may properly enough be allowed to have some weight, just as in the selection of a guardian for an infant the wishes of the infant's deceased parents are deemed worthy of consideration by the courts, even though such wishes are not expressed in legal form (*Underhill v. Dennis*, 9 *Paige*, 203; *Cozine v. Horn*, 1 *Bradf.*, 409). There seem to be good grounds for believing that, if the importance of appointing an executrix had occurred to decedent, she would have chosen Mrs. Case for that office, and, besides, that lady is a niece of the decedent and re-

MATTER OF HOYT.

sides in this city, while Mrs. Smith resides in the State of New Jersey, and is not of decedent's blood.

Letters may issue to Mrs. Case.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—October, 1886.

MATTER OF HOYT.

In the matter of the estate of JESSE HOYT, deceased.

A Surrogate's court will not pass upon proposed findings, in a controversy which has been before it, except upon the settlement of a case made for the purpose of an appeal from its determination.

Matter of Dodge, 24 *Week. Dig.*, 3—followed.

SUBMISSION of findings, preparatory to settlement of decree confirming probate of decedent's will.

ELIHU ROOT, *for executors.*

FRANK J. DUPIGNAC, *for Mary I. Hoyt.*

THE SURROGATE.—A decree confirming the probate of this testator's will is about to be entered in accordance with my decision of August 28th, 1886. Certain proposed findings of fact and conclusions of law have been submitted to me on the part of the proponents, and certain others upon the part of the contestant. In *Dickel v. Yates* (2 *Dem.*, 229) and in *Tilby v. Tilby* (3 *id.*, 258), I held that, until the settlement of a case for the purposes of appeal, the Surrogate could not be required by the parties to a controversy involving an issue of fact, to find and rule upon ques-

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MATTER OF HOONEY.

fact or questions of law submit to his determination. This interpretation of the Code regulating the judges' courts has the sanction of the case *Hartwell v. McMaster*, 4 *Redf.* 17, which has been approved by the general court, in the Third Department, 4 *Week. Dig.*, 3).

§ 2545 of the Code of Civil Procedure requires a trial such as has been had in the Surrogate must file his decision and must state separately the facts and questions of law." I have complied with this, until requested, upon the settlement I will make no other findings of fact

NEW YORK COUNTY.—HON. D. G. ROLLINS, CLERK.
GATE.—November, 1886.

MATTER OF HOONEY.

Matter of the estate of JOHN HOONEY.

The undersigned, who has furnished a funeral for the deceased, upon his own application, procure an order on the administrator to pay the reasonable expenses incurred.

Done by James Naughton, undertaker, in and to the claim.

MATTER OF NISBET.

MICHAEL J. MULQUEEN, *for petitioner.*

MORRIS & PEARSALL, *for administrator.*

THE SURROGATE.—Whether, under any circumstances, an undertaker, who has furnished a funeral for a decedent, can, upon his own application, obtain an order upon the decedent's executor or administrator to pay the reasonable expenses of such funeral, is a question that is not altogether free from doubt. It is a question, however, that need not be here determined. The respondent administrator has filed an affidavit alleging that this decedent's funeral was furnished by the petitioner at his (the administrator's) request, under an express contract as to price, and alleging further that the price so fixed upon was far below the sum for which the petitioner now asks, and that his co-administrator and himself have rejected the claim as excessive. If the administrators shall file an answer in conformity with the provisions of § 2718 of the Code of Civil Procedure, this application will be denied.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—November, 1886.

MATTER OF NISBET.

In the matter of the estate of JAMES NISBET, deceased.

The rule that, so far as the formalities of execution are concerned, a will is sufficiently proved by proof of the due execution of a codicil unmistakably referring thereto—applied.

MATTER OF NISBET.

APPLICATION for probate of will and codicil.

JOHN TOWNSEND, THOS. P. DARLINGTON, and WILLIAM STONE, for executors.

THE SURROGATE.—Unless it is made to appear that, at the time of the execution of the codicil of July 25th, 1881, there was in existence some testamentary paper other than the alleged will of July 20th, 1872, to which the testator intended to refer by using in the codicil the expression "my will," I am clear that the publication of that codicil operated as a republication of the will, and that, so far as concerns the formalities of execution the will is sufficiently proved by proof establishing that the codicil was executed in accordance with law (*Goodtitle v. Meredith*, 2 *M. & S.*, 6; *Barnes v. Crowe*, 1 *Ves.*, 486, 497; *Maddock v. Allen*, 3 *Jur. [N. S.]*, 965; *Allen v. Maddock*, 11 *Moore, P. C. C.*, 427; *Ingoldby v. Ingoldby*, 4 *No. Cas.*, 493; *Wikoff's Appeal*, 15 *Penn. St.*, 281; *Harvy v. Chouteau*, 14 *Mo.*, 586; *Utterton v. Robins*, 1 *Ad. & El.*, 423; *Gordon v. Lord Reay*, 5 *Sim.*, 274; *Payne v. Payne*, 18 *Cal.*, 291; *Van Cortland v. Kip*, 1 *Hill*, 590; *Kip v. Van Cortland*, 7 *Hill*, 346; *Van Alstyne v. Van Alstyne*, 28 *N. Y.* 375; *Brown v. Clark*, 77 *N. Y.*, 369).

MATTER OF MODERNO.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—November, 1886.

MATTER OF MODERNO.

In the matter of the estate of ANTONIO J. MODERNO, deceased.

Under L. 1860, ch. 360, declaring that no person leaving a husband, wife, child or parent shall devise or bequeath to any benevolent, etc., society more than one half of his estate, after the payment of debts, the value of the whole estate owned by a testator at the time of his death is to be reckoned, including property of which the will expressly states that it omits to dispose.

As to whether a Surrogate's court has authority to direct an executor to expend funds of his decedent's estate, to discover facts, the disclosure whereof is necessary to enable the court to construe the will as prescribed in Code Civ. Pro., § 2624—*quære*.

CONSTRUCTION of will upon application for probate.

D. J. NEWLAND, *for proponent*.

DUNNING & FOWLER, *for legatee*.]

THE SURROGATE.—The Surrogate is asked to determine, in accordance with § 2624 of the Code of Civil Procedure, the validity and effect of certain dispositions contained in this testator's will.

The sole dispositive provision of that instrument is as follows: "All my estate of every name and kind and wheresoever situate, with the exception of my real estate in the Island of Madeira, (of which I have made testamentary disposition in accordance with the laws prevailing there) I give, devise and bequeath

MATTER OF MODERNO.

unto my executor in trust . . . to invest and keep the same invested and to collect the interest and income thereof and to apply the said interest and income to the use and benefit of my wife for and during her natural life, . . . and at the death of my said wife I give and bequeath the said principal sum to my executor in trust to divide the same in equal portions among the following named institutions." Then follow the names of four charitable and benevolent societies in the city of New York.

Chapter 360 of the Laws of 1860, entitled "An act relating to wills" (3 Banks, 7th ed., 2288), declares that "no person having a husband, wife, child or parent shall by his or her last will and testament devise or bequeath to any benevolent or charitable . . . society . . . *more than one half part of his or her estate after the payment of his or her debts*, and such devise or bequest shall be valid to the extent of one half and no more." It is claimed, in behalf of this testator's widow that for the purposes of this section his "estate" should be treated as coextensive with the property of which this will undertakes to make disposition, and that the real estate in Madeira should be thrown out of consideration.

This contention seems to me unsound. Before the court can determine whether the bequest to the societies in question is to any extent invalid, the value of the whole estate owned by the testator at his death must be ascertained, and the nature of the testamentary disposition of the real property in Madeira. The court must also be advised as to the value of the trust provision for the widow's benefit.

MATTER OF CONWAY.

I can give no direction respecting the costs of making the suggested presentation of facts. I doubt my authority to direct the executor to expend moneys in this regard; and, even if the authority were beyond dispute, it would not be proper under the circumstances disclosed by the papers before me to require the representative of the estate, at the petitioner's instance, to incur expenses which events may possibly prove to be justly chargeable to the petitioner herself.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—November, 1886.

MATTER OF CONWAY.

*In the matter of the estate of ELLEN CONWAY,
deceased.*

Money paid into the treasury of the city of New York by the public administrator, as administrator of a decedent's estate, under L. 1882, ch. 410, § 239, may be obtained by any person entitled thereto, whether in his own right, or as an assignee, by means of a special proceeding in the Surrogate's court instituted by a petition presented under Code Civ. Pro., § 2717.

APPLICATION for citation to public administrator and chamberlain of New York, to show cause why certain moneys should not be paid over to petitioner.

ANDREW F. McNICKLE, *for petitioner.*

THE SURROGATE.—I have no doubt that the Surrogate has jurisdiction of this proceeding. Whenever, in pursuance of § 239 of Chapter 410 of the laws of

MATTER OF CONWAY.

1882 (the consolidation act) the public administrator has, after accounting for his administration of a decedent's estate, paid into the city treasury the balance of moneys in his hands belonging to such estate, and transferred and delivered to the corporation of the city all stocks belonging thereto, "any persons entitled to receive such moneys or stock, as creditors, legatees or relatives of the deceased" are given by § 244 "the same remedies against the said corporation for the same as they would have against any executor."

This petitioner declares that she and her sister are the only next of kin of the decedent, and that there is now in the treasury of the city belonging to this estate a considerable sum of money there deposited by the public administrator. She asks for an order directing the payment of such sum to herself—one half thereof in her own right as one of the next of kin, and the other half in her capacity as assignee of the interest of her sister. If these moneys were in the hands of an executor, and a legatee or creditor were seeking to obtain them, one of the *remedies* to which he could properly resort would be the institution of a proceeding in this court under § 2717 of the Code. Let the Comptroller and Margaret Keleher be made parties hereto. Then, if the petitioner's allegations are not denied, her application will be granted.

MATTER OF WILLIAMS.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—November, 1886.

MATTER OF WILLIAMS.

In the matter of the estate of DAVID W. WILLIAMS, deceased.

A domiciliary administrator of the estate of a decedent who died a resident of another state, leaving personal property in New York, having applied here for ancillary letters,—

Held, that, in view of applications then pending, in behalf of relatives of decedent, for original letters, the petition of the foreign representative might be denied, in the discretion of the court.

An application by a relative of a decedent, who resides within this State, for letters of administration upon the estate, must be denied if opposed by a relative, residing without the State but within the United States, who has a prior right under 2 R. S., 74, § 27, and is otherwise competent to act.

APPLICATIONS for letters of administration of decedent's estate.

BUTLER, STILLMAN & HUBBARD, *for Lucy E. Williams.*

THOMAS JACKSON, *for F. L. Williams.*

* THE SURROGATE.—This decedent died in June last, at Clarksville, in the State of Tennessee, leaving him surviving no widow, child or father. There are assets of his estate in this county, and applications for authority to administer upon these assets have been made in behalf of three persons, the decedent's mother, Lucy E. Williams, his half brother, Fielding L. Williams (now temporary administrator), and one Polk G.

MATTER OF WILLIAMS.

Johnson of Tennessee, who in July last was appointed principal administrator in that State, and who here seeks to obtain letters ancillary.

I do not agree with the counsel of Mr. Johnson that the Surrogate is bound by the requirements of § 2697 of the Code of Civil Procedure to grant the application of his client. That section simply indicates the persons to whom ancillary letters *must* be issued, ⁵⁰⁰ *or* if they are issued at all. But upon reference to section 2696 it clearly appears that the Surrogate may decline to grant letters ancillary in case of the pendency of an application made by a relative of the decedent for letters of administration. Two such applications are now pending. The petition of Polk G. Johnson is denied.

Lucy E. Williams, the mother of this decedent, has a claim to principal letters of administration superior to that of any other person. Section 27, tit. 2, ch. 6, part 2, R. S. (3 Banks, 7th ed., 2290), declares that administration in case of intestacy shall be granted to the relatives of the decedent who would be entitled to succeed to his personal estate, if they or any of them will accept the same, in the following order: 1st, to his widow; 2d, to his children; 3d, to his father; 4th, to the mother; 5th, to the brothers. It has been repeatedly held that the withholding of letters of administration from one who, if not for some cause incapacitated, would be entitled in priority under the statute, is never justifiable except in cases where his disqualification is declared by the statute itself (*O'Brien v. Neubert*, 3 *Dem.*, 156; *Coope v. Lowerre*, 1 *Barb. Ch.*, 45; *Emerson v. Bowers*, 14 *N. Y.*, 449).

MATTER OF WILLIAMS.

It is claimed by counsel for Fielding L. Williams that this claim of priority cannot be successfully maintained in behalf of a non-resident. He relies upon § 2662 of the Code of Civil Procedure, which gives the Surrogate discretionary authority to appoint an administrator upon the application of a relative of the decedent, even without citation to nearer relatives who reside without the State.

It is doubtless true that, if in the case at bar the Surrogate had heretofore granted letters to Fielding L. Williams, without notice to Lucy E. Williams, and without opposition on her part, she could not now procure the revocation of such letters upon the ground of her superior title (Matter of Brewster, *ante*, 259). But that is not the present situation. The mother and brother of the decedent are simultaneously before the court as rival applicants. The former asserts her prior right to letters. As I cannot find upon the papers before me that she is incompetent, her petition must be granted. Letters may issue accordingly; and pursuant to request and written consent Polk G. Johnson may be joined with her in the administration.

MATTER OF M'MULKIN.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—November, 1886.

MATTER OF McMULKIN.

In the matter of the estate of MARY McMULKIN, deceased.

Under Code Civ. Pro., § 2611, a testamentary paper shown to have been executed in conformity with the laws of this State is, so far as regards the formalities of execution, entitled to be admitted to probate in a Surrogate's court thereof, wheresoever and by whomsoever executed, whatever the nature of the property whose disposition it seeks to effect, and wherever such property may be situated.

Hence, where, a petition having been presented praying for probate of a will, it appeared that decedent died at Glasgow, Scotland, being a resident of that city; and was conceded that the paper was executed in Scotland while its maker resided there, that the execution was fatally defective under the laws of that country, and that there were assets in the county of New York,—

Held, that the Surrogate's court of that county had jurisdiction to decree probate thereof.

Code Civ. Pro., § 2611, as thus interpreted, is entirely consistent with id., § 2694;—the object of the latter section being to designate the laws governing the validity and effect of testamentary dispositions.

APPLICATION for probate of will.

L. H. ARNOLD, JR., *for proponent.*

HENRY HOYT, *for contestant.*

MERRILL & ROGERS, *for Isabella Funston.*

THE SURROGATE.—A paper purporting to be the will of Mary McMulkín, deceased, has been propounded in this court for probate. The petition praying for such probate alleges that the decedent died in Glasgow, Scotland, on November 19th, 1885,

MATTER OF M'MULKIN.

and that she was at the time a resident of that city. The petition does not allege that she left any assets in this county, or that there are in this county any assets belonging to her estate that have been brought hither since her death. It is plain, therefore, that as the proceeding now stands the Surrogate has no jurisdiction to entertain it. It seems to be admitted, however, that there are in fact assets of the estate in the county of New York, and it is also admitted that the paper in dispute was executed in Scotland; that the decedent was there resident at the time of its execution and that its execution is fatally defective under the laws of that country. I am asked by all parties interested to determine whether, upon this state of facts, it must necessarily be denied probate, even though it was executed in manner and form as prescribed by our Statute of Wills. Section 2611 of the Code of Civil Procedure provides that "a will of real or personal property executed as prescribed by the laws of the State, *or* a will of personal property executed without the State and within the United States, the Dominion of Canada or the Kingdom of Great Britain and Ireland, as prescribed by the laws of the State or country where it is or was executed; *or* a will of personal property executed by a person not a resident of the State, according to the laws of the testator's residence, may be proved as prescribed in this article."

It is argued with much ingenuity that the first clause of the section above quoted was not intended to cover wills of non-residents without this State, and that in passing upon the sufficiency of the execution

MATTER OF M'MULKIN.

of a will of *personalty* made without this State by a non-resident, regard should be had solely to the law of his domicil, except that such a will, wherever the decedent's domicil, should be deemed properly executed if executed in a sister State, or in the Dominion of Canada or in the Kingdom of Great Britain and Ireland, according to the law of the place of such execution.

I should be greatly disposed to put this interpretation upon the statute if its language would permit. But it seems to me to assert very squarely that if a testamentary paper is shown to have been executed in conformity with the laws of this State, it is, so far as regards the formalities of execution, entitled to probate wheresoever and by whomsoever executed, whatever the nature of the property whose disposition it seeks to effect, and wherever such property may be situated. One of the sections added by ch. 320 of the Laws of 1830 to the first title of ch. 6, part 2 of the Revised Statutes (which section appears as § 69, at page 71 of 3 Banks' Statutes, 6th edition) provided as follows: "No will of personal estate made out of this State by a person not being a citizen of this State shall be admitted to probate under either of the preceding provisions . . . unless such will shall have been executed according to the laws of the State or country in which the same was made." This provision was never repealed in terms until the passage of the General Repealing act (L. 1880, ch. 245), which ushered in the Code; but it was provided by ch. 118 of the Laws of 1876 that "every will and other testamentary instrument made out of the State of New

MATTER OF M'MULKIN.

York, and within the United States of America, the Dominion of Canada, or the Kingdom of Great Britain and Ireland, whatever may be the domicil of the person making the same, at the time of making the same, or at the time of his or her death, shall, as regards personal estate, be held to be well executed for the purpose of being admitted to probate in the State of New York, if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled when the will was made, *or by the laws of the State of New York.*

I can discover no indication that the provisions of the statute just quoted were intended by the codifiers or the legislature to be altered, so far as they relate to the matter here under discussion, by the substituted provisions of the Code.

There is no inconsistency between § 2611, as thus interpreted, and § 2694, which declares that "the validity and effect of a testamentary disposition of personal property situated within the State are regulated by the laws of the State or country of which the decedent was a resident at the time of his death. A will may be entitled to probate although all its dispositions of property may be discovered to be invalid.

MATTER OF LIPPINCOTT.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—November, 1886.

MATTER OF LIPPINCOTT.

In the matter of the estate of HANNAH A. LIPPINCOTT, deceased.

Motion costs, awarded against an executor or administrator, cannot be collected by proceedings to punish as for contempt of court. The remedy is by execution, as prescribed by Code Civ. Pro., §§ 779, 2556.

APPLICATION to punish administrator and his counsel for contempt.

GEO. W. VAN SLYCK, *for petitioner.*

OLIVER W. WEST, *in person, and for administrator.*

THE SURROGATE.—A decree judicially settling the account of John D. Fish, as administrator, *c. t. a.*, of this decedent's estate, and adjudging that he had in his hands as such administrator the sum of \$1,223.98 was entered on the 14th day of August, 1885. This decree directed the retention by the accounting party of \$507.61 as commissions, and allowed him, as costs and counsel fees on his accounting, the sum of \$295. It directed the distribution of the balance among certain specified legatees. Upon the motion of S. T. Lippincott, who claimed to be interested in the estate, this decree was set aside by an order entered on September 18th, 1885, by which order \$10 costs were allowed in favor of the moving party, against the administrator. On October 8th, 1885, an order was entered whereby a referee was appointed to pass upon

MATTER OF LIPPINCOTT.

the account. The administrator subsequently moved to strike out the objections of S. T. Lippincott. His motion was denied on March 18th, 1886, with \$10 costs.

On the same day, the order of reference was so amended as to provide that if, in the opinion of the referee, it should be practicable so to do, he should in the first instance ascertain whether the objector, Lippincott, had any interest in the estate. On June 3d, 1886, leave was granted to issue execution for the costs above referred to, and the order granting such leave allowed the applicant \$10, costs in addition. Thereupon an execution issued, which was subsequently returned unsatisfied. An application is now made in behalf of S. T. Lippincott to punish the administrator and his counsel for contempt in wrongfully paying out the funds of the estate, "under the provisions of a decree which had been obtained by a fraud upon the court and has subsequently been set aside," and for the interposition of "his own wrong as an excuse for not paying the costs," etc.

In opposition to this application, the administrator has filed an affidavit denying any misconduct in procuring the entry of the decree, and alleging that while it was in full force and effect he distributed the balance in his hands pursuant to its directions. No application has been made for the restoration of any of the moneys so paid out, and no steps have been taken to contest the account before the referee, though more than a year has elapsed since the reference was ordered. The conduct of the administrator and his counsel in connection with the entry of the decree seems to be again pressed upon my attention merely

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as a make-weight to the application to punish the administrator for contempt in neglecting to pay the \$30 costs. The manner of collecting motion costs in this court is declared by § 2556 of the Code of Civil Procedure to be the same as collecting costs upon an order in a Supreme court action. The reference is to § 779, which provides that the collection of costs upon an order may be enforced by *execution*.

This proceeding must be dismissed, without costs to either party.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—November, 1886.

MATTER OF BLANCK.

In the matter of the estate of AARON P. BLANCK, deceased.

Testator, by his will, gave "the rents, interest and entire income," of his estate to his wife during widowhood ; expressed a desire that she and their son should have a home together ; and authorized and directed the executors, in case the entire income proved insufficient to the comfortable support and maintenance of his wife, or of herself and son if residing together, to pay and advance out of the principal of his estate such sums as were requisite for the purpose mentioned.—

Held, that the ordinary rule which requires a trustee to exert himself equally for the protection of life tenant and remainderman, and to see that, at the death of the former, the latter should come into possession of all the property from which the former had derived income was inapplicable ; and, the son having died, that the entire estate must be exhausted, if necessary for the comfortable support and maintenance of the widow.

PETITION by decedent's widow for the payment of

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money alleged to be due and payable to her under decedent's will.

GWILLIM & MEYERS, *for petitioner.*

MANLEY A. RAYMOND, *for administratrix.*

THE SURROGATE.—It was clearly the intention of this testator to provide, at all events and under all circumstances, for the comfortable support of his wife so long as she should remain his widow. He gives her by the first clause of his will “the rents, interest and entire income” of all his estate, real and personal, after payment of his just debts and funeral expenses, to have, use and enjoy the same as long as she shall remain his widow. And he adds: “It is my desire that if during the life of my wife she and my son” (referring to his son Aaron, who has since deceased) “shall have their home together, and if the entire income of my estate shall prove insufficient to the comfortable support and maintenance of my said wife (or of both, if my wife and son continue to reside together), then I *authorize and direct* my said executors, from time to time, to pay and advance to my said wife, out of the principal of my estate, such sum or sums of money as may be requisite or proper to provide for her or them such comfortable support and maintenance. The above provision for my wife shall be in lieu and in bar of dower and all other claims of hers upon my estate.”

It is a familiar rule of law, that, as between life tenant and remainderman under a will, the burden of taxes and repairs must ordinarily be borne by the

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former. Counsel for the respondent in this proceeding insists that the petitioner is entitled under her husband's will, not to the gross income of his estate, but to the surplus of such gross income above the customary charges. Whether this interpretation of the will is sound or unsound is not material to the present inquiry, unless the gross income is discovered to be more than sufficient for the widow's comfortable support and maintenance; for if the net income is inadequate, the widow has an absolute right under the will to insist upon the depletion of the *corpus* of the estate to supply the deficiency. There is no room for doubt that the testator intended that his widow should continue after his death to be provided with a *home* as comfortable and as much to her liking and as suitable to her wants as the one which she enjoyed in his lifetime. He pledged his entire estate, income and principal, to the accomplishment of that object. A part of that estate at the time of his death consisted of leasehold property whose value, as he must have known, would in the course of years be extinguished. It is fair to suppose that this knowledge of the possible diminution of income in the life of the widow was one of the chief reasons why he instructed his executors to resort, in a certain contingency, to the *corpus* of the estate for the widow's benefit.

In providing for his son and for the children of his son in the event of their father's death, he does not, as the respondent's counsel claim, devise and bequeath the remainder after a mere life estate; he devises and bequeaths only such part of his possessions as may be left at the widow's death, after every penny needed

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for her comfortable support and maintenance has been devoted to that purpose. The claims of the respondent's children are clearly subordinate to those of the petitioner; and the ordinary rule of law which requires a trustee to exert himself equally to protect the tenant for life and the remaindermen, and to see to it that at the death of the former the latter shall come into possession of all the property from which the former had derived income, is not applicable to the case in hand. If the comfortable support and maintenance of this petitioner cannot be secured without devoting the entire estate to her uses, the entire estate must be exhausted in her behalf.

John W. Blanck, a nephew of the testator, formerly filed his account as such in 1885. That account shows that from the death of her husband until June, 1878, Mrs. Blanck received from the estate \$6,448, or at the rate of nearly \$1,300 per year. From June, 1878, to June, 1885, she received \$3,332.50, or at the rate of about \$475 per year. She should not be stinted to this amount nor be compelled to regulate her mode of life according to the standard which the administratrix seeks to apply.

I strongly intimated, in my memorandum of July 2d, that I might have refused to grant this respondent letters, if I had felt at liberty to do so under the law. There seemed to me reason to apprehend that the petitioner would not receive at her hands the consideration to which she is entitled under the will. The evidence now before me shows that my apprehensions were not without substantial foundation. The course which the administratrix has pursued has

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made it necessary for the petitioner to procure the services of counsel to protect and secure rights which the respondent seems disposed to deny her.

A decree may be entered directing the payment to the petitioner of \$325. Such portion of that sum should be paid out of income as the amount of income *now on hand* will justify; the remainder should be paid out of the principal. The decree must fix these sums definitely, and if counsel disagree in the premises their differences will be adjusted by the court. Counsel for the petitioner has suggested that she will be content for the future if she shall be permitted to continue in the occupancy of the premises now devoted to her use and shall receive the sum of \$50 per month. It is not necessary, and perhaps not proper, to give any direction at present in this regard. But it is hoped that some agreement may be arrived at which will be satisfactory to all parties in interest and prevent useless and expensive litigation.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—November, 1886.

MATTER OF FITHIAN.

In the matter of the estate of FREEMAN J. FITHIAN,
deceased.

Under Code Civ. Pro., § 2606, as amended in 1884, the personal representative of a deceased executor or administrator, though compellable,

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at the instance of any person interested in the estate of the first decedent, to account for the entire administration of the latter's executor or administrator, cannot be required to deliver over trust property of the first decedent's estate, except to the court or to a newly appointed representative.

PETITION by decedent's widow, who was a beneficiary under his will, for a judicial settlement of the account of the deceased executor.

CORNELL, SECOR & PAGE, *for petitioner.*

G. W. COTTERILL, *for Mary J. Clark.*

THE SURROGATE.—The will of this decedent, who died on August 4th, 1884, named Lemuel B. Clark as its executor. Mr. Clark was granted letters testamentary on October 15th, 1884. He died on June 9th, 1886, having rendered no account of his administration. He left a will of which his widow, Mary J. Clark, is executrix. She qualified as such on July 7th, 1886. On the succeeding day a proceeding was instituted in this court by Mrs. Harriet J. Fithian, widow of the testator and beneficiary under his will, for an order requiring Mrs. Clark, as executrix of her late husband's estate, to render and settle his account as Mr. Fithian's executor.

On October 14th, 1886, the respondent filed an account, the scope and character whereof are indicated by its opening sentence, which is as follows: "I, Mary J. Clark, executrix of Lemuel B. Clark, deceased, who was himself executor of Freeman J. Fithian, deceased, do hereby account for all money and other property *received by me as such executrix* belonging to the estate of Freeman J. Fithian, deceased.

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insisted on behalf of the petitioner that by § 2606 of the Code of Civil Procedure (and on that section that the present proceeding is based), she is entitled to an accounting from this estate not only as regards all money and property of the testator's estate which have come to the petitioner's hands, but also as regards all such money and property as came at any time to the hands of the testator's late husband.

On occasion in several reported cases which preceded the enactment of chapter 399 of the Laws of 1884 to consider the extent of the Surrogate's power to require the executor or administrator of an estate of a decedent A, who had acted in his lifetime as the executor or administrator of a decedent B, to account for his dealings with B's estate (*LeCount v. LeCount*, 29 N.Y. 29; *Maze v. Brown*, 2 *Dem.*, 217; *Murray v. Berpoel*, *id.*, 311; *Bunnell v. Ranney*, *id.*, 327). In the cases just cited it was held that such accounting could be insisted upon only to the extent that the representative of the deceased executor or administrator had come into possession of assets belonging to the estate of such deceased executor's or administrator's decedent.

These limitations were removed by the act of 1884 above referred to, and § 2606 was so amended to provide that "where an executor or administrator of an estate of the Surrogate's court has the same jurisdiction to compel the executor or administrator of the estate of a decedent (that is of such deceased executor or administrator) "to account which it would have if the decedent" (such deceased executor or

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administrator meaning) "if his letters had been revoked by a Surrogate's decree."

Now, in the present case, if this respondent's testator were alive he could be required, even though his letters testamentary had been revoked, to account for his entire administration of this estate. And such an account is precisely what may be required of his executrix, *i. e.*, an account of her husband's administration from the day of his appointment until his death. The only important practical change effected by the act of 1884 is one that relates purely to methods of procedure. But for that act, the course which any person interested as legatee in the estate of this testator would be obliged to pursue, in bringing about an adjustment of the claims of such estate upon the estate of the testator's deceased executor Clark, would have been that which is pointed out in the cases above cited. The new statute has provided a shorter and simpler method of adjustment. I must, therefore, sustain the petitioner's objection that the account of the respondent is on its face incomplete. It may be amended, and after amendment the petitioner will be allowed to file new objections.

PETITION for the delivery of trust property, in the matter of the same estate.

THE SURROGATE.—In the foregoing memorandum, I have held that this respondent, as executrix of her late husband, must account not only for such assets of Mr. Fithian's estate as have come to her hands, but

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for all assets of that estate that at any time came to the hands of her deceased husband. But the authority of the Surrogate under § 2606 of the Code of Civil Procedure, to compel an executor or administrator of a deceased executor or administrator of a decedent "to deliver over trust property" of such decedent, is limited to such property as has come to the possession or is under the control of the representative of such decedent's deceased executor or administrator. And even as regards *such* property the Surrogate cannot direct a delivery to any person claiming as legatee, next of kin or creditor of such decedent. The statute contemplates a delivery into court or to a newly appointed representative of the decedent's estate. By no other course could the rights of all persons interested in such estate be properly protected (*Spencer v. Popham*, 5 *Redf.*, 425). This application must be denied.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1886.

MATTER OF NOYES.

In the matter of the estate of FREDERICK B. NOYES, deceased.

Testator, by his will, directed the executors to cause his seat in the New York Stock Exchange to be sold as soon after his decease as possible, and also to collect and receive "the amount of insurance upon my" (his) life "from that exchange, and out of the proceeds of his estate,

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to pay the sum of \$20,000 to C., who proved to be his sole surviving next of kin, and to whom, by the constitution of such exchange, the gratuity referred to in the clause quoted was payable. C. collected from the exchange \$10,000, on account of the gratuity, less a discount made in consideration of advanced payment. Upon the settlement of the executors' account,—*Held*,

1. That, in collecting the gratuity fund for her own use, C. must be deemed to have received \$10,000, on account of her legacy.
2. That C. was entitled to legal interest upon the remaining \$10,000 from the expiration of one year from testator's death; and that the executors were entitled to interest on payments already made by them on account of the legacy, at the like rate from the times of the respective advances.

CONSTRUCTION of will on judicial settlement of executors' account.

EDWARD GOLDSCHMIDT, *for executors.*

BEALE & BEALE, *for Elizabeth Cottam.*

THE SURROGATE.—The second article of the will of this testator, who died in February, 1885, is in words following:

“I direct my executors to cause my seat in the New York Stock Exchange to be sold as soon after my decease as possible, and also to collect and receive the amount of insurance upon my life from the New York Stock Exchange, and out of the proceeds thereof, and out of the proceeds of my estate, to pay the sum of twenty thousand dollars to my beloved aunt, Miss Elizabeth Cottam, of Chatham Four Corners, Columbia county, State of New York; I direct that this legacy be paid as speedily as the law will permit.”

After making certain other dispositive provisions, the testator by the 11th article of his will gives the rest, residue and remainder of his estate to his two executors in lieu of all fees, charges and commissions. The executors have paid to Miss Cottam the sum of

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\$10,000, and for reasons which I shall proceed to state they insist that this payment should be taken as in full satisfaction of her legacy.

It will be noted that the testator has referred to his insurance in the New York Stock Exchange as one of the sources from which the moneys for discharging his bequest to Miss Cottam should be or might be derived by his executors. But the fact is that his estate had not been insured by the Stock Exchange on the day when he executed his will, nor was such insurance effected at any time thereafter.

The evidence is conclusive that, by his reference in the second article of his will to the proceeds of insurance upon his life, he had in mind a sum of money which by reason of his membership in the Stock Exchange, and by virtue of the 24th article of the constitution of that body, would become payable within a year after his death, in accordance with a certain scheme by such article provided.

The scheme is as follows: Whenever a member of the Exchange dies there is levied and assessed against every surviving member the sum of ten dollars, and the faith of the Exchange is pledged to pay within one year after proof of the deceased member's death the sum of \$10,000, or so much of that sum as shall be yielded by such levy and assessment, as a "gratuity" from the surviving members of the Exchange to the person or persons specified in a subsequent section of said 24th article. Such subsequent section declares who shall be the beneficiary or beneficiaries of this gratuity. In the event that the deceased member shall leave no wife or child him surviving (and

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such was the situation of this testator), the gratuity is declared to be payable to his next of kin.

Now it so happened that at the death of this testator his sole surviving next of kin was his aunt, Miss Cottam, the very person who is named as a legatee under the second article of his will. As such next of kin she became at once entitled to receive from the Stock Exchange the gratuity in such case provided. And on June 29th, 1885, she was in fact paid by that body the sum of \$10,000, less four per cent. discount from that date to February 17th, 1886, on which last named day the moneys collected from surviving members of such Exchange would have become payable under its constitution. The executors insist that by reason of this payment their liability to Miss Cottam as legatee was reduced from \$20,000 to \$10,000. Is this contention sound?

That the moneys obtained by Miss Cottam from the Stock Exchange constituted no part of the testator's estate is a proposition not open to dispute. The rules of that body are carefully framed so as to guard against any such construction. The right of Miss Cottam to receive "the gratuity" was utterly independent of any claims which she had or has under this will. It was a right springing from her kinship to the testator, and from that alone. It must, nevertheless, be borne in mind that the testator has undertaken, by the provisions of his will, to deal with this gratuity fund as if it would constitute at his death a portion of the assets of his estate, and that his testamentary dispositions are made in evident contemplation that such fund would come to the hands of his

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legal representatives, and would, like other assets, be devoted by them to the payment of debts and the satisfaction of legacies. He expressly directs his executors "to collect and receive the amount of insurance on my" [his] "life from the New York Stock Exchange." By no form of words could he have more conclusively indicated that he regarded the gratuity fund which would become payable at his death as a part of his posthumous estate. He instructs the executors to pay Miss Cottam her legacy of \$20,000 out of the moneys collected from such gratuity, which he miscalls his life insurance, and out of the proceeds of the sale of his seat in the Stock exchange, and out of the proceeds of his estate in general.

It is claimed by the executors that although Miss Cottam's legacy is thus charged not only upon the proceeds of the so called life insurance but upon the proceeds of all the testator's possessions, the testator intended, and has made his intention manifest, that the legatee should receive from the aggregate of these proceeds the sum of \$20,000 and no more, and that, having already received from the Stock Exchange the gratuity of \$10,000, she must be deemed to have elected to take that gratuity as *pro tanto* a discharge of the \$20,000 legacy.

The familiar doctrine of election as applied to wills may be thus stated: A beneficiary who chooses to accept the bounty of a testator must do so upon such terms and conditions as the testator has seen fit to impose. He cannot insist that provisions in his favor shall be enforced and that those to his prejudice shall be ignored or set at naught.

“No man,” said the Master of the Rolls, in *Whistler v. Webster* (2 *Ves.*, 367) “shall claim any benefit under a will without, as far as he is able, conforming and giving effect to everything contained in it whereby any disposition is made showing an intention that such a thing shall take place, without reference to the circumstance whether the testator had any knowledge of the extent of his power or not. . . . Whether he thought he had the right, or knowing the extent of his authority intended by arbitrary exertion of power to exceed it, no person taking under the will shall disappoint it. If a testator disposes of the estate of A., to whom he gives some interest by his will, A. shall not take that unless he gives up his own estate to that amount.”

In *Thellusson v. Woodford* (13 *Ves.*, 220), Lord Chancellor ERSKINE gave this exposition of the principle of election in its application to wills: “If a testator, intending to dispose of his property, and making all his arrangements under the impression that he has the power to dispose of all that is the subject of his will, mixes in his disposition property that belongs to another person, or property as to which another person has a right to defeat his disposition, giving to that person an interest by his will, that person shall not be permitted to defeat the disposition, where it is in his power, and yet take under the will. The reason is the implied condition that there must be an election; for though the mistake of the testator cannot affect the property of another person, yet that person shall not take the testator’s property unless in the manner intended by the testator.”

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“The foundation of the doctrine” (*i. e.* the doctrine of election), says the learned author of the note to *Dillon v. Parker* (1 *Swan*, 395), “is the intention of the maker of the instrument; and its characteristic in its application to these cases, is that by equitable arrangement effect is given to a donation of that which is not the property of the donor; a valid gift in terms absolute being qualified by reference to a distinct clause, which, though inoperative as a conveyance, affords authentic evidence of intention. The intention being assumed, the conscience of the donee is affected by the condition, not express, but implied, annexed to the benefit proposed to him. To accept the benefit, while he declines the burthen, is to defraud the design of the donor.”

Now, it seems to me that this principle of election, which is very clearly enunciated in *Havens v. Sackett* (15 *N. Y.*, 365), must control the disposition of the case at bar. True, the will before me does not in express terms give to some person other than Miss Cottam the proceeds of the “life insurance” or gratuity fund; but nevertheless these two things are manifest:

1st, the testator’s intention to dispose of his entire estate through the instrumentality of his will, and

2d, his intention to include, among the assets of the estate thus disposed of, the Stock Exchange gratuity.

Both these purposes are as plainly written on the face of the will as they would have been if the testator had inserted in that instrument a schedule of his possessions, distinctly and expressly specifying therein his so called “life insurance,” and had in terms bequeathed such life insurance to some person other than his aunt.

The ground on which courts have proceeded in compelling an election is that purposes of substantial justice require the carrying into effect of the *full intention* of the testator. It was incumbent upon Miss Cottam, therefore, if she accepted the benefits of the testator's will, to "conform and give effect to" all its provisions.

By one of those provisions the executors were directed to "collect and receive" the life insurance. It was in the power of Miss Cottam to enable them to carry out this direction by giving them an assignment or power of attorney. If the gratuity fund had thus come into the hands of the executors, and if out of that fund and out of the proceeds of sale of the testator's seat in the Stock Exchange, and out of the proceeds of the estate generally, they had paid the legatee \$20,000, they would thereby have fully satisfied the bequest provided for in the second clause of the will.

Now, Miss Cottam has elected to collect the gratuity fund for her own use. Equity will, therefore, appropriate so much of the \$20,000 legacy bequeathed to her by the will as shall satisfy the persons whom she has disappointed, by the assertion of her rights. It is true, as her counsel insist, that if the testator had left a widow, or if some person other than herself were his only surviving next of kin, she could justly have claimed the full sum of \$20,000 from the estate, notwithstanding the failure and inability of the executors to collect the gratuity as directed by the will; but in the event supposed, Miss Cottam would have been powerless to aid the executors in carrying out

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the testator's instructions, and no claim, therefore, could justly be made that her legacy should be cut down because of the persistence of some other person in maintaining his rights. Here on the other hand, the property not belonging to the decedent, which he has seen fit to treat as his own, is the property of the legatee herself.

That the view I have taken of the question under discussion will serve to effectuate the actual intention of the testator, appears probable from another consideration.

The agreement of the Stock Exchange does not bind that body to pay upon the death of a member the full sum of \$10,000, but to pay that sum or so much thereof as shall be yielded by levy and assessment upon surviving members. If at the time when testator's next of kin became entitled to the gratuity in question, that body had succeeded in collecting from its members but \$7,500, the payment of that sum only could have been enforced by the person entitled. In that event the executors would have been required to make up the remaining \$12,500 out of the estate. This possibility that the Stock Exchange insurance might fall short of \$10,000 may well have furnished the reason for the somewhat peculiar phraseology of the second article of the will. The testator was fixed in his determination that his aunt should receive the full sum of \$20,000.

If he had simply given her \$10,000 in addition to the "life insurance," his purpose might have been defeated. By assuming the amount to become due from the Exchange as a part of his estate, he made

sure that any deficiency in that particular fund would be supplied from other assets.

There remains to be considered the question what sum, if any, should be paid Miss Cottam by way of interest. That a general pecuniary legacy, given without a designation by the testator of the time for its payment, does not begin to bear interest until a year after the testator's death, is as well settled as any doctrine of law (*Bradner v. Faulkner*, 12 *N. Y.*, 472; *Wheeler v. Ruthven*, 74 *N. Y.*, 428; *Brown v. Knapp*, 79 *N. Y.*, 136; *Kerr v. Dougherty*, 17 *Hun*, aff'd, 79 *N. Y.*, 327; *Vernet v. Williams*, 3 *Dem.*, 349).

Section 43 tit. 3, ch. 6, part 2, R. S. (3 Banks, 7th ed., 2300), declares that "no legacies shall be paid by any executor until after the expiration of one year from the time of granting letters testamentary unless the same are directed by the will to be sooner paid."

In commenting upon this provision and the rule of the ecclesiastical and common law courts to which it gives legislative sanction, ANDREWS, J., says, in *Wheeler v. Ruthven* (*supra*): "The rule that a legacy is payable one year after the testator's death only applies in the absence of a direction in the will controlling the general practice established by the courts, or of other decisive evidence in the instrument, as interpreted in the light of the surrounding circumstances, of a different intention on the part of the testator. The will is to govern where it speaks upon the subject, and the time of payment may be accelerated or postponed at the will of the testator.

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But the rule does not yield to doubtful indications in the will of an intention of the testator at variance with it."

Now, there are only two expressions in the will of this testator that can be claimed to evince in the slightest degree a desire on his part that the legacy in question should be paid within the year following his death. One of those expressions is contained in the tenth article: "It is my intention," he there says, "that if my estate shall not realize a sufficient amount to pay all the legacies therein provided for, the legacy to my aunt first herein named shall be paid in full without scaling or reduction."

That this provision exalts the claim of Mrs. Cottam above those of the other beneficiaries under the will is indisputable; but it gives no direction and makes no suggestion to the executors as regards the *time* when the legacy thus preferred shall become payable.

The expression upon which counsel for the objector mainly relies is the following at the close of the second article of the will: "I direct that this legacy be paid *as speedily as the law will permit*." The law upon this subject has been already quoted. Unless a legacy is directed by the will to be sooner satisfied, the statute expressly *forbids* its payment until the lapse of a year from the grant of letters testamentary. I am compelled to hold, therefore, that Miss Cottam's legacy did not become payable until February 19th, 1886. She is entitled, however, to interest on \$10,000 from November 21st, 1885, one year after the death of the testator (*Dustan v. Carter*, 3 *Dem.*, 149). She can claim no interest what-

MATTER OF NOYES.

ever on the remaining \$10,000, as by her agreement with the Stock Exchange, to which the executors were not parties, she received in June, 1885, the sum of \$9,746.68 in discharge of an obligation for \$10,000 which that body was not bound to meet until a year from the testator's death.

The executors are entitled to precisely the same credit in this regard as they could have claimed if they had themselves similarly anticipated the payment of \$10,000, parcel of the \$20,000 legacy.

On November 21st, 1885, interest would have begun to run on the remaining \$10,000 but for the fact that the executors had advanced the legatee \$200 on April 2d, 1885. They are entitled to a credit of \$7.63 for legal interest on such \$200 up to November 21st, 1885. The legatee is allowed interest on \$9,792.37 from November 21st, 1885, to the time when her claim shall be fully discharged; and from March 11th, 1886, up to the time of such discharge interest will be allowed the executors on their \$9,800 payment. If the legatee should be paid to-day (December 1st, 1886) she would be entitled, as I make it, to \$176.23.

MATTER OF SINZHEIMER.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURRO-
GATE.—December, 1886.

MATTER OF SINZHEIMER.

*In the matter of the estate of SIGMUND SINZHEIMER,
deceased.*

The word "heirs," when used in a will to indicate beneficiaries of a bequest of personal property, must be interpreted as equivalent to "next of kin," in the absence of anything pointing to another interpretation as more consonant to the testator's intention.

Testator, who left, him surviving, an aunt, L., his sole next of kin, by his will devised and bequeathed the residue of his estate, which consisted of personalty, with a specified exception to his "natural heirs."—

Held, that L. was the beneficiary indicated.

By another article of the same will, testator directed his executors, in case one T. retained, at the time of testator's death, the ownership of certain realty, to pay "the two mortgages" (describing them) "now liens upon the said house and lot, or any balance of either or both."

One of the mortgages was paid by T. during testator's life time.—

Held, that the executors were only authorized to satisfy the other.

CONSTRUCTION of will, on judicial settlement of account of administrators with the same annexed.

FRASER & MINOR, *for administrators.*

SAMUEL D. SPEYER, *for Laura Levinger.*

JOHN E. BRODSKY, *special guardian.*

THE SURROGATE.—This decedent died in May, 1885, leaving as his last will an instrument which was executed in July, 1882. In November, 1884, he married one Christina Tems to whom by the first article of the will he has bequeathed a legacy of \$5,000. Mrs. Sinzheimer survived her husband and as administratrix *c. t. a.* of his estate is now accounting before

MATTER OF SINZHEIMER.

the Surrogate. Upon this accounting two questions have arisen for determination.

First. What is the true construction of the third article of the will? Its language is as follows:

"All the rest, residue and remainder of my property, both real and personal, I give, devise and bequeath to the following parties, viz.: Five thousand dollars to Katie Tems and the balance to my natural heirs."

Now who are the testator's *natural heirs*? No children were born of his marriage. He left him surviving no ancestors, descendants, brothers, sisters, nephews or nieces. So far as appears, his only next of kin, at the date of his will and on the day of his death, was his aunt, Laura Levinger.

There can be no doubt that if he had given his residuary estate (which consists of personalty) to his "*heirs*" instead of to his "*natural heirs*" this aunt would have been entitled thereto, to the exclusion of all other persons. The recent decision of the Court of Appeals in *Tilman v. Davis* (95 *N. Y.*, 17) has conclusively established that the word "*heirs*," when used by a testator to indicate the beneficiaries of a bequest of personal property, must be interpreted as equivalent to the term "*next of kin*," in the absence of any thing pointing to some other interpretation as more consonant to the testator's intention; and that a man's widow is neither his heir nor his next of kin has been repeatedly declared by the courts of this State (*Drake v. Pell*, 3 *Edw. Ch.*, 251; *Slosson v. Lynch*, 33 *Barb.*, 147; *Murdock v. Ward*, 67 *N. Y.*, 387; *Keteltas v. Keteltas*, 72 *N. Y.*, 312; *Tilman*

MATTER OF SINZHEIMER.

). Unless, therefore, this testator's d "natural" in connection with the mehow affects the signification which by itself would have, I must regard d as decisive of the matter under dis-

referred me to two reported testamen-
ich the expression "natural heirs"
ject of judicial interpretation. These
rchill (78 *N. C.*, 372) and Ludlum v.
0). In the former the bequest was
"I bequeath to my sisters, Nancy
h one thousand dollars, and in the
th of either without leaving natural
it I have bequeathed shall go to the
as held that the testator must have
"natural heirs" as an equivalent for
ren " or "issue." For very palpable
clusion was unavoidable.

whose will was before the Supreme
partment, in Ludlum v. Otis (*supra*),
ng a sister, his mother and several
t neither wife nor child. It was held
iven by his will to his "natural heirs"
nother and sister, they being the per-
se of proximity of blood, would have
personal property in the event that
state.

cited differs from the case at bar in
In the former it was of no practical
ether the term "natural heirs" was
aning "heirs," or was held to have

no meaning at all. Upon the one theory the mother and daughter were entitled as next of kin to take under the will; upon the other they were similarly entitled to take under the Statute of Distributions. But in the present case, if the disposition of the residuary estate is to stand, the testator's aunt will receive the benefit, while if it is to be held void because of uncertainty in the description of the legatee, the property thus ineffectually bequeathed must fall to his widow. I do not find sufficient ground for holding the bequest of the residue invalid, in the mere fact that the testator has somewhat obscured his intentions regarding it, by tacking the adjective "natural" to the noun "heirs."

There is nothing in the context of the will, nothing, so far as appears in the circumstances of the testator or the state of his family, from which it can be inferred or suspected that by his use of the word "natural" he designed either to enlarge or restrict the meaning which would have been accorded to the word "heirs" standing by itself.

I hold, therefore, that Laura Levinger is entitled, as the testator's only next of kin, to his entire residuary estate.

Second. At the date of this testator's will, Miss Tams, who afterwards became his wife, was the owner of a certain dwelling house in this city, on which there were then subsisting two mortgages, one of \$8,000, the other of \$2,000.

In the lifetime of the testator, and before his marriage to Miss Tams, the \$2,000 mortgage was paid off by her, and was satisfied of record. It is admitted

MATTER OF SINZHEIMER.

that the moneys thus applied were borrowed by Miss Tems, and that the lender was not repaid until after the testator's death. It is now claimed in her behalf that under the second article of the will she is entitled to be reimbursed for this payment. Such second article is in these words :

"I hereby order and direct my executors in case my said friend Christina Martha Tems retains at the time of my decease the ownership of the house and lot now owned and occupied by her, to pay and fully discharge the two mortgages, one of \$8,000, and the other of \$2,000, now liens upon the said house and lot, *or any balance of either or both*, and to fully free, release and discharge said property therefrom and to satisfy such mortgages."

The portion of the foregoing provision which I have italicized is inconsistent with any other interpretation than this: that to the extent that the mortgages in question were a lien upon the house and lot at the time of the testator's death, and to that extent *only* are his executors authorized to apply all or part of the sum of \$10,000 for discharging the incumbrances upon such property.

Whether Miss Tems borrowed the \$2,000 or found it, or received it as a gift of the testator, or otherwise obtained it, is therefore immaterial. The smaller of the two mortgages was in fact discharged before the testator's death, and so far as concerns that mortgage the situation for which he made contingent testamentary provision has ceased to exist.

MATTER OF BROOKS.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1886.

MATTER OF BROOKS.

In the matter of the estate of JOHN A. BROOKS, deceased.

At the time of decedent's death, there was on deposit, in a savings bank, to the joint credit of himself and wife, a sum of over \$1,900, which the widow, after her appointment as administratrix, withdrew from the bank, and one half of which, less \$150 set apart for her benefit, was included in an inventory of decedent's property.—

Held, that an exception to a finding that the amount of the deposit was the joint property of decedent's estate and his widow, and that, in the absence of evidence as to the respective proportions, the latter was accountable as administratrix, for only one half thereof, should be overruled.

The disposition of moneys paid, at a decedent's death, by benefit associations whereof he was a member, is governed by the regulations of those associations, such moneys not constituting assets of his estate.

A widow of a decedent, who is appointed administratrix of his estate, cannot be allowed credit for payment of her husband's funeral expenses, where she has received, as "funeral expenses," from "benefit associations," more than the amount paid out by her in such behalf.

HEARING of exceptions to report of referee, to whom were referred the account, and objections thereto, of the administratrix of decedent's estate, filed in proceedings for judicial settlement.

ROBERT O'BYRNE, *for administratrix.*

P. Q. ECKERSON, *for Christopher Brooks, and others.*

A. H. VANDERPOEL, *special guardian.*

THE SURROGATE.—To the account filed by this administratrix in December, 1885, certain objections were interposed by three adult children of the dece-

MATTER OF BROOKS.

dent, and by the special guardian of two infants interested in his estate. The issues thus raised were submitted to a referee, whose report is before me. I pass upon the various exceptions to his findings and conclusions as follows:

First. It appears that at the time of decedent's death there was in the hands of the Hudson City Savings Institution, to the joint credit of himself and his wife, now his widow and administratrix of his estate, the sum of \$1,929.04, and that the widow, as such administratrix, subsequently withdrew those moneys from their place of deposit. It further appears that one half of such moneys (less the sum of \$150 set apart, pursuant to law, for the widow's benefit) was included in an inventory filed by her as administratrix, and was appraised as assets of her husband's estate.

The referee has found this deposit of \$1,929.04 to be "the joint property of the estate of John A. Brooks and Eliza A. Brooks," the widow, and has held that "in the absence of any evidence as to the respective proportions of each, the administratrix is chargeable with only one half of the amount of such deposit." It is insisted by the executors that she is chargeable with the whole.

Under the circumstances disclosed by the evidence, it seems to me that if the referee has erred at all in this matter he has erred in favor of the contestants. Surrogate BRADFORD held, in *Rom. Cath. Orphan Asylum v. Strain* (2 *Bradf.*, 27), that a deposit of moneys in the joint name of husband and wife with the privity of the husband must be taken as *prima facie* a gift of such moneys to the wife in the event of her surviving

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her husband, and that where such deposit had been left undisturbed by the husband, the moneys became on his decease the property of his wife.

The doctrine of the case just cited was recently asseverated by the Supreme court, in the Second Department in *Platt v. Grubb* (1 *State Rep.*, 494). The moneys on joint deposit which were there held to have become the property of a wife at the death of her husband were distinctly found to have belonged, before the making of such deposit, to her husband alone. And yet DYKMAN, J., declared, in pronouncing the opinion of the court: "By reason of the unity of husband and wife in the view of the law an obligation taken in the name of both inures to the benefit of both and the whole goes to the survivor." "This old rule of law," he added, "is still prevalent in this State," citing *Bertles v. Nunan* (92 *N. Y.*, 152) and *Sanford v. Sanford* (45 *N. Y.*, 723; 58 *N. Y.*, 72).

It was held by the Courts of Appeals in the latter case that, where a husband had loaned money, the taking by him of a promissory note for its payment to the order of himself *and* his wife, imported a gift to his wife in case she should survive him. It was further held, upon the second appeal, that "the fact that she (the widow) gave the note to the appraisers as a part of her husband's estate, while it is evidence tending to show that she had released to him her right of survivorship, is not conclusive, and does not stop her from claiming the note, in the absence of evidence that the position of any party has been

MATTER OF BROOKS.

changed in consequence, or that any transaction was had in reliance thereon."

From the testimony of the administratrix in the case at bar it appears that, in drawing the moneys in dispute from the bank where they were deposited, she acted in her capacity as administratrix because the officer of the bank told her to do so, and she "obeyed his order."

There is nothing at variance with the principle governing the case above cited in the decisions of *Mulcahey v. The Emigrant's Industrial Sav. Bank* (89 *N. Y.*, 435); *Gelster v. The Syracuse Savings Bank* (17 *Week. Dig.*, 137); or *Syracuse Sav. Bank v. Hess* (23 *Week. Dig.*, 280). The exceptions which relate to the item of \$1,929.04 must be overruled.

Second. The decedent in his lifetime was the member of several lodges and associations, by the provisions of whose constitutions and bylaws certain sums of money, amounting in all to \$321, were paid after his death to his widow. She has charged herself with none of these moneys, and the referee has held that she is not liable to account for them in this proceeding.

From Chelsea Division No. 12 of the Sons of Temperance she received \$50. By the constitution and bylaws of that society it is provided that in case of the death of a member the sum of \$50 shall be appropriated as a "funeral benefit," and shall be paid "to the family of the deceased."

From the Mamre Encampment, I. O. of O. F., Mrs. Brooks received \$40, the sum which under its constitution was payable upon her husband's death as a

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“funeral benefit” and to assist in defraying the expenses of burial.”

Eureka Encampment No. 177, I. O. O. F., paid her \$100, that being the amount which in accordance with its constitution and bylaws was payable “to the widow” of a deceased member.

Mrs. Brooks received from the Fidelity Temple of Honor and Temperance the sum of \$50. The bylaws of that association provide that a sum no less than that shall be appropriated for the funeral expenses of a deceased member and paid to the wife or immediate relatives or expended by an officer of the society in paying such bills as shall be contracted for a funeral.

The Chelsea Mutual Benefit Association paid Mrs. Brooks \$81, pursuant to one of its bylaws, which provides that in the event of the death of a member “the sum of one dollar, for each and every member, shall be paid to the family of the deceased.”

I think that the referee has properly held that the administratrix is not here accountable for any of these payments. It is well settled by numerous decisions that the disposition of moneys paid at a decedent's death by benefit associations, whereof he was a member, must be determined entirely by the constitutions and bylaws of such associations, and that such moneys are not assets of such decedent's estate (*Greeno v. Greeno*, 23 *Hun*, 478; *Brown v. Catholic Mut. Ben. Ass'n*, 33 *Hun*, 263; *In re Palmer*, 3 *Dem.*, 129; *Hellenberg v. B'Nai Berith*, 94 *N. Y.*, 580).

Third. The referee has found that the administratrix is entitled to credit on account of sums paid out

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by her as funeral expenses. The testimony shows that within six months after the decedent's death his widow received from the four associations first above named, as "funeral benefits" and "funeral expenses," a sum in excess of that for which in this account she claims credit.

It is true, that at the time these moneys were received the funeral expenses had been fully satisfied, but I think nevertheless that their reception must be considered as a reimbursement to the administratrix of any sum previously expended by her in connection with her husband's funeral (*Leidenthal v. Correll*, 5 *Redf.*, 267).

With the modifications above indicated the referee's report is confirmed.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1886.

MATTER OF VAN DYKE.

*In the matter of the estate of ISAAC VAN DYKE,
deceased.*

Decedent died in August, 1874, and letters of administration of his estate were issued, on September 15th of that year, to M., who died September 11th, 1885, his account never having been judicially settled. In October, 1885, respondent was appointed administrator with the will of M. annexed; and on September 16th, 1886, petitioner, one of the next of kin of the first decedent, filed a petition, under Code Civ. Pro., § 2606, praying for an accounting, with a view to payment of his distributive share. Respondent answered that petitioner's claim was

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barred on September 15th, 1881, seven years after the issuing of letters to M.—

Held, that, by virtue of Code Civ. Pro., § 1819, which took effect September 1st, 1880, whereby a cause of action for a distributive share is deemed to accrue when the administrator's account is judicially settled, and *id.*, § 414, making such rule applicable to special proceedings, petitioner's claim was not barred ; and that respondent must account.

APPLICATION to compel a judicial settlement of administrator's account.

ALEXANDER MELHADO, *for petitioner.*

EDWARD G. BLACK, *for administrator, c. t. a.*

THE SURROGATE.—This is a proceeding brought by one of the next of kin of Isaac Van Dyke, deceased, under § 2606 of the Code of Civil Procedure, for an order compelling an accounting from the representative of the estate of Michael M. Van Dyke, deceased, who was in his lifetime the administrator of the estate of this decedent.

Isaac Van Dyke died on August 18th, 1874. Letters of administration upon his estate were issued to Michael M. Van Dyke on September 15th, 1874. On September 11th, 1885, Michael died, leaving a will which was thereafter admitted to probate, and an estate whereof this respondent was, on October 26th, 1885, appointed administrator, *c. t. a.*

The petition by which the present proceeding was set on foot was filed on September 16th, 1886. The respondent insists by his answer that the petitioner's claim has not been capable of enforcement since September 15th, 1881, seven years after the issuance of letters to this decedent's administrator.

That the statute limiting the period for the commencement of an "action" for obtaining the relief

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here sought, or other relief of kindred character, is applicable to such a proceeding as the one at bar is well settled (*McCartee v. Camel*, 1 *Barb. Ch.*, 455, 465; *Clark v. Ford*, 1 *Abb. Ct. App. Dec.*, 359; *Mead v. Jenkins*, 95 *N. Y.*, 31; *Carman v. Brown*, 4 *Dem.*, 96; *Warren v. Paff*, 4 *Bradf.*, 260; *Martin v. Gage*, 9 *N. Y.*, 398; *Clock v. Chedeagne*, 10 *Hun*, 97; *Cole v. Terpenning*, 25 *Hun*, 482; *Smith v. Remington*, 42 *Barb.*, 75; *Am. Bib. Soc. v. Hebbard*, 51 *Barb.*, 552, 570; *Loder v. Hatfield*, 71 *N. Y.*, 92; *House v. Agate*, 3 *Redf.*, 307; *Drake v. Wilkie*, 30 *Hun*, 537; *Butler v. Johnson*, 41 *Hun*, 206; *Foster v. Town*, 2 *Dem.*, 333).

The six years limitation prescribed by § 18, tit. 2, ch. 4, part 3 of the Revised Statutes (vol. 2, 3d ed., page 394), was kept alive after the repeal of that section by § 91 of the old Code of Procedure and is still preserved in § 382 of the Code now in force.

This limitation applies to "actions" for obtaining payment of a legacy or a distributive share, and applies also to proceedings instituted in this court by the legatee of a testator or the next of kin of an intestate for a like purpose, or for compelling an executor or administrator to account (see cases cited *supra*).

By § 414 of the Code of Civil Procedure the rules of limitation prescribed by § 382 are made applicable (save in certain cases not necessary to be here specified) to all civil actions and special proceedings. It does not matter when the cause of action may have arisen or accrued, whether after or before the enactment of ch. 4 of the Code, except only that where

before such enactment the right to relief had already become extinguished, it is not revived.

Section 410 when read in the light of the definition of the word "action," employed in § 414, postpones the commencement of the time within which an action or special proceeding can be instituted, in cases where a demand is necessary to entitle a person to maintain such action or proceeding, until the time when the right to make such demand is complete. It was provided by § 9, tit. 5, ch. 6, part 2 of the R. S. ; 3 Banks, 6th ed., 1232 (and this provision continued in force until the adoption of the second part of the Code of Civil Procedure), that an action or proceeding to recover a legacy or distributive share would not lie until after reasonable demand for payment; and such demand could not be made until the expiration of a year from the granting of letters testamentary or letters of administration.

Whether we look, therefore, to § 410, *ante*, or to § 9, *ante*, as applicable to the matter now under discussion, it is clear that, but for a Code provision not yet referred to, if the administrator of this decedent had been living on September 16th, 1886, the date of the filing of this petition, and if on that day, which was more than one year plus six months after such administrator had obtained his letters, a proceeding had been brought against him similar in character to the present, he could have successfully interposed the shield of the Statute of Limitations.

His right to the protection of that statute if it accrued at all did not accrue however until September 15th, 1881. Now on September 1st, 1880, § 1819 of

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the Code of Civil Procedure became law. That section declares that "if after the expiration of one year from the granting of letters testamentary or letters of administration, an executor or administrator refuses upon demand to pay a legacy or distributive share, the person entitled thereto may maintain such an action against him as the case requires. But for the purpose of computing the time within which such an action must be commenced, the cause of action is deemed to accrue when the executor's or administrator's account is judicially settled, and not before." This section is a substitute for § 9, tit. 5, ch. 6, part 2, R. S., to which I have before referred.

In view of the provisions of § 1819 and of the authorities above cited establishing the applicability to proceedings in this court of the rule of limitations applied in like cases in actions, I cannot doubt that as this decedent's administrator never rendered any account of his trust, the petitioner could have maintained against him a proceeding like the present as well after as before September 15th, 1881. This right subsisted at the time of the administrator's death, and is now, under § 2606 of the Code, enforceable against his representative. This conclusion is supported by § 3352, whose provisions are, in substance, identical with those of subdivision 2, sec. 3, ch. 245, of the laws of 1880. The effect of both those enactments is to exempt from the operation of § 1819 those cases, and those cases only, in which the right to interpose the Statute of Limitations had accrued before § 1819 became law (*U. S. Life Ins. Co. v. Jordan*, 5 *Redf.*, 209; *People v. French*,

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31 *Hun*, 617; *Acker v. Acker*, 81 *N. Y.*, 143; *Butler v. Johnson*, *supra*).

The respondent must account.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1886.

MATTER OF FLEMING.

In the matter of the estate of HENRY FLEMING, deceased.

The discretionary authority, conferred by Code Civ. Pro., § 2672, upon Surrogates, to permit an action to be brought against the temporary administrator of a decedent's estate, should not be exercised where the result might be the infliction of a greater injury than the claimant would suffer by reason of a refusal. Persons interested in the estate should, in general, be allowed the opportunity of resisting claims by the aid of counsel of their own choosing.

PETITION for leave to sue temporary administrator of decedent's estate.

GEO. W. CARR, *for petitioner*.

MARTIN & SMITH, *opposed*.

THE SURROGATE.—The petitioner, Francis A. Fleming, applies under § 2672 of the Code of Civil Procedure, for leave to sue the temporary administrator of this estate. Her application is based upon affidavits alleging that the decedent, at the time of his death, was indebted to the applicant and to the estates whereof she is the representative, in amounts aggregating over \$60,000. The discretionary authority

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which is here invoked should never, I think, be exercised during the pendency of a probate controversy, where its exercise, at the instance of one of the parties to such controversy, might result in inflicting upon his adversary an injury far greater than he himself would probably suffer if his application were denied.

Now, if this petitioner should be delayed in the prosecution of an action to recover her claim until the termination of the pending probate proceeding, it is unlikely, under the circumstances disclosed by the papers before me, that, however that proceeding may terminate, her interests or the interests of the estates whereof she is the representative can be seriously prejudiced; I can readily see, on the other hand, how the persons named as beneficiaries in the alleged will may, in case that instrument shall be accorded probate, suffer irreparable injury by the success of the petitioner's motion.

She is one of the contestants in the probate controversy. The entire assets of this estate will be inadequate to satisfy her claim if it shall be finally established, and it seems but just that the proponent and legatees should have the opportunity to resist it with the aid of counsel of their own choosing and in an action the defence of which will be under their own control.

Application denied.

MATTER OF COHN.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1886.

MATTER OF COHN.

In the matter of the estate of CHARLES COHN, deceased.

An executor or administrator cannot get the judgment of the Surrogate upon a question of paying the bill of counsel for services rendered in the administration of the decedent's estate, but must rely upon his own convictions of propriety and legality, and await a reckoning upon the settlement of his account.

SUBMISSION of question to Surrogate, upon agreed facts.

KURZMAN & YEAMAN, *claimants.*

SIGISMUND KAUFMANN, *executor.*

THE SURROGATE.—The will of this testator appoints one Sigismund Kaufmann as its executor. It contains the following provision: "Should Mr. Kaufmann by any cause be prevented from serving as executor, Dr. Rudolph Frankel may step in as alternate, or if he too should be prevented, Mr Albert Klamroth will be kind enough to act as executor of my will."

At the time of Mr. Cohn's death, Mr. Kaufmann was absent from the country, and it was uncertain when he would return. For reasons set forth in the statement of facts submitted upon the present application, Dr. Frankel proceeded to propound the will, and employed counsel to advise and assist him in the conduct of the proceeding for its probate. Probate was subsequently decreed, and letters testamentary

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were issued to Mr. Kaufmann. The statement of facts above referred to has been agreed upon by him, and by the proponent's attorneys, in order, as they say "to avoid expense of controversy and action, and with the object of getting the judgment of the Surrogate whether the said bill should be paid or rejected." This court is without jurisdiction in the premises. An administrator or executor is at liberty to pay "such sums as are just and reasonable" for rewarding legal services rendered in its administration, and for such expenditures is entitled to reimbursement out of the funds of his decedent's estate (L. 1863, ch. 362; *Stokes v. Dale*, 1 *Dem.*, 260; *St. John v. McKee*, 2 *id.*, 236; *Journault v. Ferris*, 2 *id.*, 320).

He must act upon his own responsibility, and, upon the settlement of his accounts, when all persons interested in such estate are before the court, his claim for credit can be considered and passed upon. If, in the case at bar, the executor shall decline to recognize the claim of the proponent's attorneys, they must of course seek their remedy in some other tribunal.

MATTER OF WINSOR.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1886.

MATTER OF WINSOR.

In the matter of the estate of WILLIAM WINSOR, deceased.

A widow, who is general guardian of the property of her son, may be allowed for past maintenance of her ward, where the latter, on attaining majority, cites her to account, with a view to payment to him of his interest in the estate of his father, of which respondent was administratrix, and the amount so allowed may be set off against that found to be due to petitioner.

HEARING of exceptions to report of referee to whom were referred the account of general guardian, and objections thereto, filed in proceedings for judicial settlement.

JOHN A. MAPES, *for guardian.*

RUFUS F. ANDREWS, *for ward.*

THE SURROGATE.—Richmond Winsor, the father of this petitioner, died intestate, in the year 1863, leaving a small estate, whereof his widow, Josephine Winsor, the petitioner's mother, was appointed administratrix.

On November 2d, 1885, a decree was entered in this court whereby the account of Mrs. Winsor, as such administratrix, was judicially settled and determined. That account showed that, on May 1st, 1886, she paid over to herself, as her son William's general

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his share and interest in his father's estate, amounting to \$1,909.94.

She attained his majority on May 13th, 1883, and on November 24th, 1885, filed a petition praying that a guardian be cited to account. An account was rendered by her on December 11th, 1885. Objections were subsequently interposed thereto, and the same were submitted to a referee, whose report is now before me on a motion for its confirmation.

The guardian stands charged in her account with a certain named sum of \$1,909.94 and with \$1,238.88 in addition, in all with \$3,148.82. By his objection the petitioner claims that this statement is not an accurate statement of the moneys received by the guardian for his benefit. The referee has overruled this objection and the petitioner has asked for its reversal.

This exception must be sustained.

The evidence establishes to my satisfaction that the moneys which came to the hands of the guardian from her husband's estate have ever since remained in her hands, and with the accumulations thereon they have amounted, at the time of their reinvestment in 1882, to \$3,666.66; that with such amount, together with the interest which the new investment has produced from January 1st, 1883, to the date when this report shall be entered, the respondent is entitled to such decree be held chargeable.

It is, however, of the limited extent of her remuneration since the death of her husband, the unremunerated results of the business in which she has been engaged for her own support and that of her son, and

MATTER OF WILLETS.

the absence of any facts indicating a purpose on her part to relieve the petitioner and his estate from liability to reimburse her for sums expended for his benefit, she is, in my judgment, justly entitled to an allowance for past maintenance (Matter of Bostwick, 4 *Johns. Ch.*, 100; Wilkes v. Rogers, 6 *Johns.*, 566; Matter of Kane, 2 *Barb. Ch.*, 375, 381; Harring v. Coles, 2 *Bradf.*, 349; Bruin v. Knott, 9 *Jur.*, 979; Voessing v. Voessing, 4 *Redf.*, 360; Brown v. Bedford, 4 *Dem.*, 304, 310; Furnam v. Van Sise, 56 *N. Y.*, 435; Beardsley v. Hotchkiss, 96 *N. Y.*, 201, 219; Hyland v. Baxter, 98 *N. Y.*, 610, 614). The credit claimed by her in this regard is not, under all the circumstances, unreasonable. It is, therefore, allowed.

* * * * *

The report of the referee, with such modifications as I have indicated, is confirmed.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1886.

MATTER OF WILLETS.

*In the matter of the estate of SAMUEL WILLETS,
deceased.*

The executors of testator's will having, in pursuance of a decree, paid to themselves as trustees, a sum of money, as a fund to produce certain annuities provided for in the will, and filed their account as such trus-

MATTER OF WILLETS.

tees, certain of the *cestuis que trustent* filed an objection insisting that the income yielded by the fund in hand was excessive, and that a portion of the principal should be restored to the residuary estate.—
Held, that the objection, pointing out no error in the account, could not be entertained, and that the relief sought could be procured, if at all, only in an independent proceeding.

HEARING of objection to account of executors of, and trustees under, decedent's will, interposed in proceedings for judicial settlement.

WILSON M. POWELL, *for trustees.*

GEO. H. FORSTER, and PEBBY J. FULLER, *for objectors.*

THOMAS HARLAND, *special guardian.*

THE SURROGATE.—This testator's executors were directed, by a decree entered in April, 1885, whereby their accounts were settled and determined, to "pay to themselves as trustees the sum of \$400,000, as a fund to produce the several annuities provided for in said will." This direction they obeyed on May 1st, 1885, and on January 30th of the present year they filed their account as trustees of the fund in question. The will provides that that fund, and the unappropriated income thereof, shall, on the decease of the annuitants, as they shall respectively die, be divided among the grandchildren of the testator who shall be living at the time of the death of the annuitants respectively; and that for the purposes of this trust the trustees shall only retain a sum "sufficient to produce the required amount for the remaining annuitants."

The will of Mr. Willets consists of three testamentary papers. One of the articles of the first of these instruments directs a division of the residuary estate

MATTER OF WILLETS.

into six shares, and the payment of the income of such shares respectively to the testator's six grandchildren so long as they shall respectively live, and the division of the principal of each of said shares, at the time of the death of the grandchild to whom such share had theretofore yielded income, among his or her lawful issue.

As to one of these grandchildren, Mrs. Aurelia W. Leavitt, and as to her issue, the foregoing provision was revoked by a codicil ; but I have heretofore determined that though Mrs. Leavitt is thus expressly excluded from sharing in the income of the residue, she will be, so long as she shall live and so long as any portion of the annuity fund shall remain in the hands of the trustees, entitled equally with the testator's other grandchildren to a portion of the surplus of that fund and of its income, as such surplus shall from time to time arise and become distributable by reason of the death of an annuitant (see *Frame v. Willets*, 4 *Dem.*, 368).

To the account now before the Surrogate several objections have been filed in behalf of the residuary *cestuis que trustent*. None of these objections, however, are now insisted upon except this : It is claimed that the income yielded by the \$400,000 fund is much in excess of the sum necessary to feed the annuities, and that a portion of that fund therefore should be returned to the residuary estate. Counsel for the objectors asks that a reference be ordered to ascertain what portion may be thus returned without jeopardizing the claims of the annuitants.

This is a matter which cannot, it seems to me, be

MATTER OF WOOD.

properly considered in the proceeding now before the court. It does not concern the correctness of the account for whose judicial settlement and determination this proceeding was brought. The objection in question does not point out any error in that account. It neither seeks to charge the trustees with amounts claimed to have been omitted by them nor to falsify items with which they ask to be credited.

If it can be shown to the court in a proper proceeding that a smaller fund than that now in the hands of the accounting parties would be amply sufficient to secure the annuities, it may be that these objectors will be found entitled to the relief which they here seek, but any inquiry that may be had in this regard should be had in a proceeding instituted for that express purpose.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURRO-
GATE.—December, 1886.

MATTER OF WOOD.

In the matter of the estate of SAMUEL WOOD, deceased.

Where a special proceeding instituted under Code Civ. Pro., §§ 2729, 2810, by an executor, trustee, for the judicial settlement of his account, has been abandoned by consent of all the parties, the same cannot be brought to a hearing, and a creditor, or person interested cannot intervene under id., § 2731.

A petition presented under Code Civ. Pro., §§ 2726, 2808, in behalf of an infant, praying for the judicial settlement of the account of an executor, trustee, cannot be dismissed because of petitioner's failure to

MATTER OF WOOD.

appear by general or special guardian. If respondent, on return of the citation, petitions for a settlement of his account, a special guardian cannot be appointed in the original proceeding ; otherwise such an appointment is proper at a later stage of the cause.

APPLICATION of William Wood for an accounting by the executors of and trustees under decedent's will.

B. E. VALENTINE, *for William Wood.*

E. SCHENCK, *for respondents.*

THE SURROGATE.—Under all the circumstances disclosed in the papers before me I must grant the motion of the respondents for the resettlement of the order of July 10th, 1886, directing them to account.

William Wood, who instituted the proceeding in which that order was entered, has since its entry filed his consent that the proceeding be discontinued. It is questionable, in view of this fact, whether an order could now be lawfully entered therein upon the motion of any of the persons who have sought to intervene. The only authority for the voluntary intervention, in proceedings for executors' and trustees' accountings, of any person other than the petitioner or petitioners, and the person or persons by him or them caused to be cited, rests upon §§ 2731 and 2810 of the Code of Civil Procedure.

Assuming now what is not entirely clear, that the right to such intervention exists in compulsory accountings as well as in accountings had at the instance of a petitioning executor or trustee, the sections referred to do not sanction such intervention until "the hearing." Now no "hearing" has yet been entered upon in the case at bar, and there is much force in the res-

MATTER OF WOOD.

pondents' contention that as this proceeding was instituted by William Wood alone, his abandonment of it has made any hearing impossible.

Even if this contention is unsound the proceeding must be dismissed. Of the persons who are named as parties in the July order, one is dead, and all the others have either formally consented to a discontinuance or have released their interests in the estate.

There may be grave reasons to doubt whether the course pursued by the executors and trustees in effecting settlements with these persons is authorized by the will under which they have been acting, or will hereafter, in case it is assailed, be sanctioned by the Surrogate; but this matter does not now arise for determination.

APPLICATION, for the like relief, made by Mary A. Wood, as administratrix, etc., and in behalf of her infant children.

B. E. VALENTINE, *for Mary A. Wood.*

E. SCHENCK, *for respondents.*

THE SURROGATE.—This petitioner is the widow of Martin Wood, deceased, who was in his lifetime a legatee under the will of this testator, and one of the executors and trustees of his estate. She applies for an accounting of the surviving executors and trustees, both in her capacity as administratrix of her deceased husband and on behalf of her children, Mary B. Wood and Alfred L. Wood, both of whom are infants.

The respondents allege in their answer that, prior to the commencement of the proceeding at bar, the

MATTER OF WOOD.

petitioner brought against them in the Supreme court an action, which is still pending, and in which the administratrix of Martin Wood, deceased, may obtain the very relief which she is here seeking.

It is true that she does not in that action expressly ask for an accounting, but they insist that something in the nature of an accounting can nevertheless be had if there shall be need of it, and that a recovery upon the claims which the administratrix is prosecuting in the Supreme court would make any accounting before the Surrogate unnecessary.

The effect upon the proceeding at bar of the pendency of the action referred to need not, however, be the subject of serious consideration. For I must order an account to be filed upon the application in behalf of Mrs. Wood's children, and when such an account is presented, Mrs. Wood, as administratrix, may doubtless make herself a party to the proceeding for its settlement, notwithstanding the continued pendency of the suit in the Supreme court.

The children referred to are heirs and next of kin of their late father, Martin Wood, and are entitled as such, under the first subdivision of the second clause of this testator's will, to receive upon the death of their uncle, Joseph Wood, a legacy of \$5,000. This is an interest which entitles them to demand an account (Code Civ. Pro., §§ 2726, 2808, § 2514, subd. 11; *Campbell v. Purdy*, 5 *Redf.*, 434; *Hood v. Hood*, 85 *N. Y.*, 577).

The respondents further claim that the petition in behalf of the infants should be dismissed, because they do not appear either by general or special guardian.

MATTER OF WOOD.

This contention is unsound. Sections 2726 and 2808 (*supra*) expressly declare that in behalf of an infant interested in a decedent's estate, "any person" may present a petition praying for an accounting by such decedent's executor, administrator or testamentary trustee. Thereupon a citation must be issued directing the person cited to show cause why he should not be ordered to account. If upon the return day of such citation he makes application for a voluntary accounting, he cannot be ordered to account in the proceeding instituted in behalf of the infant, and no occasion therefore can arise in *that* proceeding for the appointment of a special guardian. Such an appointment is seasonably made if made upon the return of the citation issued upon the petition of the accounting party himself.

If a person cited on behalf of an infant to account as executor, administrator or trustee fails, on the other hand, to file a petition for a voluntary accounting, but undertakes, as the respondents have undertaken in the case at bar, to show cause why he should not be required to account, the petition in the infant's behalf should not be dismissed without affording him an opportunity by general or special guardian to oppose its dismissal.

If the infant's petition is granted and an account ordered, and there is no appearance by the general guardian, no further steps should be taken in the proceeding until after the appointment of a special guardian.

An order may be entered, directing the respondents to account.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1886.

MATTER OF TIETJEN.

In the matter of the estate of JOHN G. TIETJEN, deceased.

Testator's will gave his entire estate to the executors in trust for the benefit of his widow for life, with remainder to his children. The executors having recovered a judgment against a debtor to the estate, upon which the latter had paid, from time to time, certain sums not in excess of the interest due thereon, without directions as to the mode of its application, the widow presented a petition praying that the amount so paid be turned over to her, as interest and income belonging to her under the will.—

Held, that though, as between the debtor and the estate, the money in question might be deemed to have been paid as interest, and not in reduction of principal, the same must, as between the widow and the children, be regarded as *corpus* and not income, and that the prayer of the petition must be denied.

APPLICATION by Anna R. Tietjen, decedent's widow, to compel payment to her of moneys alleged to be due and payable to her under decedent's will.

ROBERT W. TODD, *for petitioner.*

JACOB F. MILLER, *for executors.*

THE SURROGATE.—By the second clause of his will, this testator gives all his estate, real and personal, to his executors in trust, to collect the rents of the realty, and to invest and keep invested the personal estate in bonds and mortgages, or in stocks or bonds of the City or State of New York, or of the Government of the United States; to collect the interest and divi-

MATTER OF TIETJEN.

dends thereon, and to apply the rents, income, interest, etc., to the use of his wife during her life. Upon her death, the entire estate is given in remainder to such of the children of the testator as shall be then living.

In September, 1880, the executors recovered a judgment in the Supreme court against one Lichten for the sum of \$2,600 and upwards. Lichten has, from time to time, at irregular intervals, and in varying amounts, paid on this judgment the sum of \$560. No one of the payments has been in excess of the amount due as interest on the judgment.

An application is now made in behalf of the widow, that the executors be directed to turn over to her the aforesaid sum of \$560, as interest and income to which she is entitled under the will. It appears by the affidavit of one of the executors that an execution issued on the judgment in question soon after its recovery, was returned unsatisfied; that several sums amounting in all to the \$560, subsequently paid by the judgment debtor, were paid without any direction as to their application to the discharge of his indebtedness. The respondent insists that the entire amount must be treated as principal to be invested, and that the petitioner is only entitled to the income thereon.

It does not appear that an execution issued against Lichten would be of any more avail now than was that which was returned unsatisfied in 1880; and if Lichten should die to-day, the \$560 he has already paid would represent the entire interest of the *cestuis que trustent* for life and of the remaindermen in the avails of the judgment against him.

It seems to me, therefore, that, even if counsel for

MATTER OF PETRIE.

the petitioner is correct in claiming that as between Lichten and this estate the moneys he has paid should be deemed to have been paid as interest and not in reduction of the principal, nevertheless they must be deemed as between the testator's widow and children to be corpus and not income.

It was doubtless the intention of the testator that his children should enjoy, at their mother's death, whatever she had herself enjoyed theretofore; and if, while she is yet alive, Lichten shall discharge his indebtedness to the estate, an occasion will arise for some readjustment of the respective interests of herself and her children in the proceeds of this judgment.

At present, her petition must be wholly denied.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1886.

MATTER OF PETRIE.

In the matter of the estate of ANN PETRIE, deceased.

Testamentary trustees, to whom their testator's will has given his residuary estate in trust, with power "to collect and receive the income thereof, to sell and dispose of the same, and to reinvest the proceeds of such sale in any manner that they shall deem best in order to realize a fair income therefrom, *without restriction as to the character or class of such investments,*" are not thereby authorized to lend to each other assets of the estate, or invest them upon the hazardous security of a second mortgage.

APPLICATION for revocation of letters of surviving executor of decedent's will.

MATTER OF PETRIE.

BUTLER, STILLMAN & HUBBARD, *for petitioner.*

P. Q. ECKERSON, *for executor.*

THE SURROGATE.—An application is here made for the removal of George H. Petrie from his office as surviving executor and trustee of and under the will of this testatrix, Ann Petrie, deceased.

By that will, which was admitted to probate in September, 1868, the testatrix gave her entire residuary estate to her executors, in trust, “to collect and receive the income thereof, to sell and dispose of the same, and to reinvest the proceeds of such sale in any manner that they shall deem best in order to realize a fair income therefrom, without restriction as to the character or class of such investments.”

The will further directed that out of such income the executors should pay over to Ann Petrie, daughter of the testatrix, an annuity of \$1,000 during her natural life, that they should make equal division of the balance of the income among the four sons of the testatrix, James, Alexander, Jonathan and George, and that, at the decease of the annuitant, they should convert the entire estate into cash and distribute the proceeds equally among the four sons above named, *if they should be then living.*

“And in case,” the will proceeds to say, “any of my said sons shall die before my said daughter, leaving a child or children, or leaving no child or children but leaving a widow him surviving, then such child or children or such widow, or such person or persons as my said son so dying shall by his will and testament for that purpose name shall take the share or

MATTER OF PETRIE.

portion of my estate and of the income thereof which said son would by the foregoing provisions be entitled to receive."

I am clearly of the opinion that, by the provision last above quoted, the testatrix intended that, in the event of the death of any one of her sons in the lifetime of her daughter, leaving a child or children him surviving, such child or children of such son so dying should receive the share of the estate which such son himself would have received had he lived to take it.

The provision for payment to the widow of a deceased son, or to the person or persons named in his last will, was not intended to be effectual unless such son should leave him surviving no child or children. Now, three of these six petitioners are sons and the three others are daughters of the decedent's son Alexander who died in 1872, while his sister, Ann Petrie, the annuitant, now deceased, was yet living.

I hold, therefore, that the petitioners are persons "interested in the estate" and "beneficially interested in the execution of the trust" within the meaning of those terms in §§ 2685 and 2871 of the Code of Civil Procedure, and are accordingly entitled to invoke the authority of the Surrogate for the removal of this respondent as executor and trustee.

The respondent does not deny the allegation of the petition that he and his brother Jonathan, now deceased, who was in his life time one of the executors of this estate, set apart the sum of \$15,500 as a fund for producing the annuity provided by the will for their sister Ann. Nor does the answer dispute that the moneys thus set apart were borrowed by the ex-

MATTER OF PETRIE.

ecutors for their personal and private use, the respondent taking to himself \$7,500 of that amount and his associate \$8,000. Each of them individually gave to the other as executor, by way of security for the payment of the respective loans, a mortgage upon certain real property.

The security furnished by this respondent was a second mortgage upon premises at Spuyten Duyvil, N. Y., already burdened with an incumbrance of \$7,000. The value of this property on April 1st, 1869, when the second mortgage was effected, does not clearly appear. The respondent says, in his answer, that at the time he supposed that the loan was "amply secured." He does not deny the petitioner's allegation that the property is now worth no more than \$12,000, and that an attempt to enforce the collection of the loan by foreclosure would result in a deficiency of \$2,500 or \$3,000.

The conduct of this respondent in borrowing a portion of the funds of the estate, under the circumstances above disclosed, and in lending to his co-executor another portion, constituted a serious breach of trust. While the testator clothed his executors with large discretionary powers he certainly did not authorize them to lend to each other the assets of the estate or to invest them upon the hazardous security of a second mortgage (Matter of Cant, *ante*, 269, and cases cited; King v. Talbot, 40 *N. Y.*, 76; Adair v. Brimmer, 74 *N. Y.*, 539; Lockhart v. Reilly, 1 *De G. & J.*, 464, 476; Norris v. Wright, 14 *Beav.*, 291, 307; Drosier v. Brereton, 15 *Beav.*, 226; Westover v. Chapman, 1 *Coll. C. C.*, 177; Savage v. Gould, 60 *How. Pr.*, 234;

MATTER OF PETRIE.

Singleton v. Lowndes, 9 *So. Car.*, 465; Stickney v. Sewell, 1 *Myl. & Cr.*, 8; In re Walker, 5 *Russ.*, 7; Tuttle v. Gilmore, 36 *N. J. Eq.*, 617).

The mere fact that an executor, administrator or trustee has, without lawful authority, borrowed funds entrusted to his charge does not *ipso facto* call for his removal. But when his conduct has been such as to endanger the trust property, or to show a want of honesty or of proper capacity or of reasonable fidelity, he must be pronounced "unfit for the due execution of his office," and must accordingly be deprived of it (*Morgan v. Morgan*, 3 *Dem.*, 612; *Code Civ. Pro.*, §§ 2685, 2687, 2817).

It is urged in behalf of this respondent that he must be held harmless for making the investments here assailed because of a certain agreement entered into on April 27th, 1869, between himself, his co-executor and certain persons interested in the estate, including Alexander S. Petrie, the father of these petitioners. There is nothing in the terms of that agreement, or of the decree of April 19th, 1870, by which it is recognized, tending to show that any of the parties thereto, other than the executors, were cognizant of the fact that the loans to which it refers were loans to the executors themselves, or that one of those loans was protected by no better security than a second mortgage. And, besides, these petitioners were not parties to the agreement and are not bound by the decree. Assuming, therefore, that the executors would have been protected in case Alexander S. Petrie had outlived the annuitant, they took the risk of his failing to do so, and as in fact the annuitant was living at

MATTER OF MARSHALL.

death, the surviving executor must suffer
ices.

ssedly unable to inake immediate resto-
estate of the funds he has borrowed, and
can only be enforced by proceedings
nd his property, I direct that his letters
be revoked, and that he be removed from
rustee under this testator's will.

COUNTY.—HON. D. G. ROLLINS, SURRO-
GATE.—January, 1887.

MATTER OF MARSHALL.

*r of the estate of GEORGE MARSHALL,
deceased.*

te of decedent was given by his will to the executors, in
at of the income, an annuity to his widow during her life
and, during the same period, to distribute the excess of
d the annuity, as follows: one third to his sister A., or,
lie before the death or remarriage of the widow, to her
third to his sister B., with a like contingent substitution;
ing third "to the children of my (his) sister C., equally."
ldren of C. having died, her husband, as administrator of
died for a decree directing payment to him of his intes-
surplus income, which had accumulated during her life-
of the widow, who was still living and unmarried. A
on the matter was referred, having found in favor of
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clearly expressed or implied in the will, an intention
attributed to testator, that the share of the deceased
ould pass to her legal representative rather than to the

MATTER OF MARSHALL.

survivors; but that the question should not be finally determined until all the children of C. had been made parties.

Lyons v. Mahan, 1 *Dem.*, 180; Rauchfuss v. Rauchfuss, 2 *id.*, 271—distinguished.

CONTROVERSY as to construction of will, upon judicial settlement of account of testamentary trustee.

GEO. C. COFFIN, *for J. C. Rosa.*

WILLIAM H. BLAIN, *for Margaret D. Brewster.*

ELBERT L. BURNHAM, JR., *for trustee.*

THE SURROGATE.—The residuary estate of this testator was given by his will to his executors in trust to pay to his widow out of the rents, income and profits thereof the sum of \$300 annually during her life or widowhood, and during the same period to distribute the rents, income and profits in excess of that sum as follows: one third part to his (the testator's sister Mary, or in case she should die prior to the death or remarriage of his widow, then to her children; another third part to his sister Eliza, with a similar substitution of her children for herself in a contingency analogous to that just specified, the remaining one third part "to the children of my deceased sister Ann Davis, equally."

On September 26th, 1883, a decree was entered in this court whereby the account of the acting trustee of this estate was settled and determined, and whereby it was adjudged and decreed that he had theretofore received from his predecessor in office, and then held in his hands, the sum of \$2,465.71, belonging to the children of Ann Davis, aforesaid, and that there were also due to said children certain other sums by

MATTER OF MARSHALL.

way of interest upon the said \$2,465.71, and as parcel of the surplus income of this estate since it had come into the possession of the accounting trustee.

The decree aforesaid directed the payment to Margaret D. Brewster, one of the daughters of the said Ann Davis, deceased, of one third of the said sum of \$2,465.71 and interest, and the retention by said trustee of the remaining two thirds thereof until the further order of the Surrogate. On June 20th, 1885, John Caspar Ross filed a petition in this court, wherein he alleged among other things, that Annie M. Davis, another of the children of said Ann Davis, deceased, had become his wife in the year 1862, and had died intestate in March, 1883, and that in June, 1885, he, the said petitioner, had obtained letters of administration upon her estate from the Surrogate of this county. He asked that, in view of the foregoing premises, the trustee of this estate be directed to pay him one third part of the said sum of \$2,465.71, with interest, etc., being the same amount theretofore ordered to be paid Margaret D. Brewster, and being parcel of the surplus income as aforesaid that had accrued during the lifetime and widowhood of the wife of the decedent, who is still living and has never remarried.

This application and the answer thereto were submitted to a referee whose report in favor of the petitioner I am now asked to confirm. Certain of the findings of the referee involve the determination that, by the terms of his will, the testator contemplated that, in the event of the death of any child of his deceased sister Ann during the continuance of the trust

MATTER OF MARSHALL.

for the benefit of his widow, the share of the income that such child would have taken if he or she had continued to live, should pass, not to the surviving children of Ann, but to such person, perhaps a stranger to the testator's blood, as might be the legal representative of the estate of the child so dying.

I doubt whether such an intention should be attributed to the testator, unless it is very clearly expressed in his will, or unless some rule of law or principle of construction applicable to the situation forbids any other interpretation of that instrument.

His executors are directed upon the death or remarriage of his widow, to convert the entire estate (which seems to consist of real property exclusively) into money, and, after the defrayment of certain expenses thereout, to divide the proceeds into three equal parts, and to make distribution as follows: "one third part to the children and descendants *then* surviving of my sister Mary, another third part to the children and descendants *then surviving of my* sister Eliza, and the other third part to the children and descendants *then* surviving of my deceased sister Annie."

From this disposition of the remainder it may be claimed, not unreasonably, that no children of Ann, save those who shall be living at the time the estate is directed to be converted, will be entitled to share in the proceeds of the conversion, and that that proposition is sound, irrespective of the question whether the children of Ann are given merely a contingent interest in such proceeds, or whether each of them is given a vested interest therein, defeasible by reason

MATTER OF MARSHALL.

or death before the death or remarriage of 's widow. And in view of this disposition under, it is certainly questionable whether 1 of Ann who have survived their deceased not be entitled to such share of the surplus ch has accrued since her death, as she her- laim were she alive to take it.

s cited in behalf of the petitioner, uphold- im of the representative or heir of a de- ui que trust of income bequeathed by a me that had accrued subsequently to the ; decedent, were cases where such decedent d to have had an *indefeasible* vested inter- rincipal or *corpus* of the trust estate (see lahan, 1 *Dem.*, 180; aff'd, 98 *N. Y.*, 372; v. Rauchfuss, 2 *Dem.*, 271). And such, re situation in Thompson v. Conway (23 and in Embury v. Sheldon (68 *N. Y.*,

ition to the claim that all the children of 's sister Ann, who were living at his death, ted interest in the surplus income that ue before the termination of the trust may be urged with some force that such me is given to the three children of Ann r as joint tenants, so that the share of any a who might die during the subsistence of ould go at once to the survivors.

It now declare what in my view is the true 1 of the provision here in controversy. I the above suggestions merely to indicate im of this petitioner is of doubtful validity,

MATTER OF AARON.

and that there should be no adjudication in his favor until all persons whose rights might be thereby prejudiced shall have been afforded opportunity to be heard (*Beekman v. Vanderveer*, 3 *Dem.*, 221).

One of the children of Ann Davis has voluntarily appeared in this proceeding by her attorney and makes no opposition to the petitioner's application. The other, a son, is not before the court. He should be cited to attend the proceeding, and when he shall have appeared, or, after due service of citation, shall have failed to appear, his rights and the rights of all other persons interested herein will be adjudicated.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—January, 1887.

MATTER OF AARON.

In the matter of the estate of ELIAS E. AARON, deceased.

A decree, refusing probate to an alleged will, directed the temporary administrator of decedent's estate to make certain payments, as costs, out of such estate.—

Held, that this decree made the administrator a party to the special proceeding of which it was the determination, and gave him a standing which justified a motion on his part for its modification.

A Surrogate's court is without authority to direct a temporary administrator of a decedent's estate to pay thereout any sum as costs of a special proceeding instituted to procure probate of the will.

Costs, when allowed, must be awarded to parties and not to their counsel.

MATTER OF AARON.

A *per diem* allowance, for time occupied in preparing for trial, is permissible only in respect of accounting proceedings, as specified in Code Civ. Pro., § 2562.

APPLICATION to modify decree, refusing probate to papers propounded as decedent's will.

TUTTLE, GOODELL & BROOKS, *for the motion*.

LANGBEIN BROS. & LANGBEIN, *opposed*.

THE SURROGATE.—Pending a controversy in this court over the claim to probate of two papers, each of which had been propounded as solely constituting this decedent's last will and testament, his son, Charles E. Aaron, who had appeared in the proceeding as a party contestant, was appointed temporary administrator of the estate, and entered at once upon the duties of that office.

The proceeding resulted, on November 25th, 1885, in a decree which adjudged that neither of the papers aforesaid was entitled to probate. That decree contained the following provisions:

"It is ordered" . . . "that Charles E. Aaron, as temporary administrator of Elias E. Aaron, deceased, pay to George F. Langbein, Esq., attorney for Charles E. Aaron, the sum of ten hundred dollars costs out of the estate of said deceased; and that he pay to Gilbert H. Crawford, Esq., attorney for Fitzgerald Tisdall and Isaac A. Drake" (contestants in the proceeding) "the sum of \$500.00 costs out of the said estate." After this decree was entered, the genuine will of this decedent was admitted to probate, and letters testamentary thereon were issued to the said Charles E. Aaron.

On June 30th, 1886, Messrs. Tuttle, Goodell &

MATTER OF AARON.

Brooks, as "attorneys for Charles E. Aaron, temporary administrator and executor," obtained from the Surrogate an order to show cause why so much of the decree of November, 1885, as awards costs out of said estate directly to the said attorneys, Langbein and Crawford, and directs that the same be paid by Charles E. Aaron, as temporary administrator, should not be vacated, and why such other relief should not be granted as might seem just.

Mr. Langbein responded to the order to show cause by filing certain affidavits, wherein it was, among other things, alleged that a law firm in which he had been and then was a partner, had appeared in this court in divers specified proceedings as the attorneys of record of the said Charles E. Aaron as temporary administrator, and that such firm had not consented that any other person or persons be substituted in its stead as attorney or attorneys for such temporary administrator, and that no order had been entered in this court directing such substitution.

It is claimed that, for this cause, the moving party herein has no right to make his motion by his present attorneys, and it is also claimed that he has no standing to make it at all, as he was not, in his capacity of temporary administrator, a party to the controversy over probate.

Neither of these objections is sound. The fact that the Messrs. Langbein have acted in certain proceedings connected with this estate, as the attorneys for the moving party herein, does not preclude such party from availing himself in other proceedings of the services of other attorneys. It may be that the

MATTER OF AARON.

respondent is technically correct in insisting that, as the temporary administrator, as such, was not a party to the proceeding for probate, he should, before moving to vacate the decree complained of, have sought and obtained leave of the court so to do; but if he asks no more than justice requires, his application may properly be treated as if all formal preliminaries had been by him duly observed.

The decree itself made him for the first time a party to the proceedings of which it was the culmination. It directed him to pay out to certain persons, for certain specified purposes, certain moneys in his hands belonging to this estate. He should certainly be permitted to show, if he can, that that direction was not within the jurisdiction of the court, and should he be successful the decree thus discovered to be erroneous must be set aside.

First. The first ground of complaint against this decree is that the Surrogate was without authority to order any part of the expenses of the probate controversy to be paid by the temporary administrator. The general powers of such an officer are specified in §§ 2672 and 2674 of the Code of Civil Procedure. The latter section authorizes him, under certain circumstances, to pay debts contracted by the decedent in his lifetime. Section 2672 provides that the Surrogate may authorize a temporary administrator to pay a legacy or a distributive share, or expenses incurred by him in the administration of his trust, or the funeral expenses of his decedent, or "*stenographer's or referee's fees on contest of a will or administration.*"

The express grant to the Surrogate of authority to

MATTER OF AARON.

direct a temporary administrator to pay out moneys for the purpose specified in the words above italicized affords of itself a strong argument in support of the proposition, that, to that extent only, can a temporary administrator be empowered to defray the expenses of a controversy over probate. The chief function of that office is to collect and preserve the estate. He can lawfully part with its assets only in cases and under circumstances distinctly specified in the statute. This view is in harmony with all the adjudicated cases that have fallen under my observation.

It was decided, in 1859, in the Matter of Parish (29 *Barb.*, 637) that the collector of a decedent's estate could not be ordered by the Surrogate to pay the costs and expenses of a proceeding for the probate of such decedent's will.

In 1877, it was held in Matter of Haskett (4 *Redf.*, 165) that prior to the enactment of § 10, chapter 359, Laws of 1870, the Surrogate had no authority to direct such a collector to pay the claims of his decedent's creditors, and that after that enactment such authority could be exercised only within the limitations which the section prescribed.

It was held, in Matter of Cogswell, decided in March, 1880 (4 *Redf.*, 341), that this court could not direct a collector to pay his decedent's funeral expenses; and in Riegelman v. Riegelman, decided in October of the same year (4 *Redf.*, 492), that it could not direct him to pay a legacy or distributive share. Either of those directions would be lawful under the Code as it now stands (§ 2672, *supra*). Surrogate LIVINGSTON declared, in Matter of Badger (7 *Law*

Bull., 71), that he was powerless to grant an order directing a temporary administrator to pay the costs of a contested proceeding for the grant of letters of administration.

In view of the language of § 2672, the decisions above cited, and the history of the legislation touching collectors and temporary administrators, I am convinced that the direction in the decree here complained of was unauthorized.

Second. It was unauthorized for another reason and in another particular. The costs for whose payment it provided were awarded directly to counsel. Since the repeal of chapter 359 of the laws of 1870 no such award has been warranted by law. Costs, if allowed at all, must be allowed not to counsel, but to parties, in accordance with the provisions of § 2561 of the Code of Civil Procedure (*Walton v. Howard*, 1 *Dem.*, 103).

Third. The directions for the payment of \$1,000 to Mr. Langbein was based upon a bill of costs presented by him and upon an affidavit alleging that, in the performance of his duties as attorney in the probate proceeding, he had been necessarily employed for ninety-three days. If all that time had been occupied in the trial the amount allowed by the decree would not be in excess of the statutory limit; but it appears upon examination of the affidavit referred to, that Mr. Langbein was actually engaged in court on but fifty-one days, and that he devoted the remainder of the ninety-three days to preparation for trial. Now for time expended in such preparation the Surrogate has no authority to grant a per diem allowance, ex-

MATTER OF AARON.

cept under the circumstances indicated in § 2562; and that section relates to accounting proceedings exclusively. The maximum award that could properly have been made on the disclosures of Mr. Langbein's affidavit and bill of costs was \$584.24. That award would have afforded inadequate compensation for the zealous and efficient services that were rendered by him in the proceeding for probate. Indeed, the entire amount allowed by the decree is much less than those services were fairly worth as between counsel and client; but the limitations of § 2561 cannot for any cause be overpassed.

The motion of the temporary administrator must be granted, and the decree of November 25th, 1883, must be amended, so that the last paragraph may read as follows: "And it is further ordered that there be allowed to said Charles E. Aaron, one of the contestants herein, the sum of \$584.24 as costs and counsel fee of George F. Langbein, his counsel in these proceedings, the same to be paid out of the funds of this estate by such person or persons as shall hereafter be granted letters of administration or letters testamentary upon the estate of this decedent; and that there be allowed to the contestants, Fitzgerald Tisdall and Isaac A. Drake, as costs and counsel fee of Gilbert H. Crawford, their counsel, the sum of \$250, to be paid in the same manner as aforesaid out of the funds of this estate." The last named sum is all that can properly be allowed the parties represented by Mr. Crawford, under the circumstances disclosed by his affidavit.

MATTER OF SCHEUER.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURRO-
GATE.—February, 1887.

MATTER OF SCHEUER.

*In the matter of the estate of MOSES (otherwise HENRY)
SCHEUER, deceased.*

One claiming to be decedent's widow and, as such, entitled to letters of administration of his estate, having moved for the revocation of such letters previously issued to others, and supported her application by her affidavit of personal transactions and communications between herself and decedent, respondents objected to the evidence as incompetent under Code Civ. Pro., § 829.—

Held, that respondents had relieved petitioner from the disqualification contended for, by putting in evidence declarations of decedent denying the relationship upon which the application was based.

PETITION for revocation of letters of administration.

JAMES M. SMITH, *for petitioner.*

SAMUEL B. HAMBURGER, *for administrators.*

THE SURROGATE.—Letters of administration upon the estate of this decedent were granted to his aunt and another on November 29th, 1886. On December 7th, the petitioner commenced proceedings for the revocation of those letters, claiming that she was herself, as the widow of decedent, entitled, in priority, to administer.

Numerous affidavits have been submitted by the respective parties, some supporting, some attacking the allegations of the petition. I am asked by coun-

MATTER OF SCHEUER.

sel for the respondents to disregard all statements made by the petitioner as to personal transactions and communications between herself and the decedent upon the ground of her incompetency under § 829 of the Code of Civil Procedure to give testimony in that regard.

The respondents have put in evidence declarations of the decedent denying that the petitioner was his wife, and disclosing what he claimed to be the relations between himself and her, and the circumstances under which she made the Chicago affidavit. By pursuing this course, the respondents have relieved the petitioner from the disqualification established by § 829 (*Smith v. Crawford*, 3 *Hun*, 585; *Marsh v. Brown*, 18 *Hun*, 319; *Potts v. Mayer*, 86 *N. Y.*, 302; *Wadsworth v. Heermans*, 85 *N. Y.*, 639; *Estate of Stanley*, *N. Y. Surrog. Dec.*, May 27th, 1886). I cannot make proper disposition of the matter here at issue upon the affidavits submitted by the respective counsel; the case is peculiarly one in which an oral examination and cross-examination of witnesses is desirable if not indeed essential for the discovery of the truth.

There must be an order of reference.

MATTER OF KNITTEL.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—February, 1887.

MATTER OF KNITTEL.

*In the matter of the estate of ANTOINETTE KNITTEL,
deceased.*

Code Civ. Pro., §§ 2706-2714 were designed to afford a simple and summary procedure whereby an executor or administrator might secure the surrender of *property, belonging to his decedent's estate*, discovered to be in the hands or under the control of one not lawfully entitled to the possession.

Those sections do not authorize the examination of a debtor of a decedent, merely for the purpose of ascertaining the nature and extent of the debtor's liabilities to the estate.

Hence, where an administratrix caused the president of a savings bank, in which a deposit had been made in trust for her decedent during her life time, to be cited to attend in court, and asked that he be examined, in order that petitioner might be fully advised as to said moneys and the detention thereof, and in order that she might obtain payment of the same,—

Held, that money so deposited became at once the *property of the depositor*; and that the proceedings for examination should be dismissed.

SPECIAL proceeding instituted for the discovery of assets of decedent's estate.

JOHN McCRONE, *for administratrix.*

NORWOOD & COGGESHALL, *for bank.*

THE SURROGATE.—In the lifetime of Antoinette Knittel, this decedent, who died before she had attained her majority, one Margaret Knittel, now deceased, deposited in the Bowery Savings Bank, in trust for Antoinette's benefit, a certain sum of money. The administratrix of this estate has caused the president of such savings bank to be cited before the Sur-

MATTER OF KNITTEL.

rogate, and now asks that such president be examined, in order that she, the petitioner, may be "fully advised as to said moneys and the detention by said bank of the same," and in order that she may obtain payment of the same. It is claimed by counsel for the bank that the petition shows on its face that the applicant is not entitled to the relief which she seeks, and that such petition should therefore be dismissed.

I have no doubt of the purpose which the legislature aimed to accomplish by the enactment of §§ 2796-2714 of the Code of Civil Procedure—the provisions of law here invoked by the petitioner. Those sections were designed to afford a simple and summary procedure whereby the executor or administrator of a decedent might obtain an order for the surrender and delivery of such money or other property belonging to such decedent's estate as should be discovered to be in the hands or under the control of some person or persons not lawfully entitled to the possession thereof.

The sections of title 4 of chapter 18, which precede § 2712, merely point out the course which must be pursued by the representative of a decedent's estate in order to effect the result indicated in the last named section—*i. e.*, the delivery of any money or property of such estate found to be withheld or concealed by one having no just title to its possession. Whenever, therefore, it is apparent at any stage of a proceeding based upon the sections referred to that such a result is in the nature of things unattainable, the proceeding should terminate.

Assuming the truth of the allegations of this peti-

MATTER OF KNITTEL.

tion, it is clear that no disclosures that might be made upon an examination of the person here cited would justify such an order as is contemplated by § 2712, for it is true, as counsel for the respondent contends, that the moneys which were deposited in the Bowery Savings Bank by Margaret Knittel became at once the property of the bank, and that by reason of such deposit a liability was created on the part of the bank to pay thereafter an amount equal to such deposit, together with interest thereon according to the terms of the contract under which such deposit was made (*Whitlock v. Bowery Sav. Inst'n*, 36 *Hun*, 460; *Lund v. Seaman's Bank for Savings*, 37 *Barb.*, 129; *Peo. v. Mechanics & Traders' Sav. Inst'n*, 92 *N. Y.*, 7).

While it must be assumed for the purposes of the respondent's motion to dismiss this proceeding, that the bank has never paid over or accounted for its indebtedness, it is nevertheless true that it has now in its hands no specific moneys whose delivery to the petitioner this court has authority to direct by virtue of § 2712.

The fact that the deposit in question was made, not to the credit of the depositor herself, but in trust for another person, and that person an infant, is a circumstance which does not, in my judgment, affect the matter here presented for determination.

A decision that the inquiry must proceed could only be justified upon the ground that the representative of an estate is accorded, by §§ 2706-2714, the right to examine a debtor of his decedent merely for the sake of ascertaining the nature and amount of

MATTER OF GALL.

such debtor's liabilities to the estate. This ground is untenable. Proceedings dismissed, without costs to either party.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—March, 1887.

MATTER OF GALL.

In the matter of the estate of JOSEPH GALL, deceased.

A child of a decedent, born of a marriage contracted before the execution of the will of the latter, cannot contest the admission of that instrument to probate upon the ground that he is not therein or otherwise provided for; but is confined to the remedy, afforded by Code Civ. Pro., § 1868, to recover the share of the property saved to him by 2 R. S., 65, § 49. *Contra*, where the marriage followed the testamentary act, and issue thereof, so situated, survives; in which case the will is to be deemed revoked, pursuant to 2 R. S., 64, § 43.

APPLICATION for probate of will.

JAMES T. LAW, *for proponent.*

A. SIMIS, JR., *special guardian.*

THE SURROGATE.—I am asked to admit to probate two papers propounded as together constituting this decedent's last will and testament, notwithstanding certain objections interposed in behalf of one Caroline Gall, an infant, who is claimed by her special guardian to be decedent's posthumous child.

One of these objections challenges the jurisdiction of this court, but, upon the affidavits and papers here-

MATTER OF GALL.

tofore submitted, I am convinced that it is not well taken. It must, *therefore*, be overruled.

In his only other objection, the special guardian alleges that "subsequent to the making of the said will" the testator married one Amelia Steel; that said Amelia Steel thereafter gave birth to the infant, whom such special guardian here represents, and that such infant is issue of such marriage. It is further set forth in the second objection that the "said will" undertakes to dispose of the decedent's entire estate; that it contains no provision for such infant, and makes no mention of her; and that the decedent has not provided for her apart from such alleged will by settlement or otherwise.

It is insisted by counsel for the proponent that, if Caroline Gall is in truth the daughter of the decedent, born after the making of the will, she is entitled, by the express terms of the statute in such cases provided (§ 49, tit. 1, ch. 6, part 2, R. S.; 3 Banks, 7th ed., 2287), to the same share in this estate which would be hers if her father had died intestate; that therefore she has no interest in this proceeding, but that she should be required to resort, after the probate of the will, to the remedies afforded by § 1868 of the Code of Civil Procedure.

Such is undoubtedly the situation of affairs if, at the time the decedent executed the latter of the two papers here in controversy, he and Amelia Steel were husband and wife. If however their intermarriage occurred *after* such execution the rights of the infant Caroline Gall, if she is in truth the decedent's daugh-

MATTER OF GALL.

ter, are to be ascertained by reference to § 43, tit. 1, ch. 6, part 2, R. S. (3 Banks, 7th ed., 2286).

That section provides that "if, after the making of any will disposing of the whole estate of the testator, such testator shall marry and have issue of such marriage, and the wife or issue of such marriage shall be living at the death of the testator, *such will shall be deemed revoked*, unless provision shall have been made for such issue by some settlement, or unless such issue shall have been provided for in the will or in such way mentioned therein as to show an intention not to make such provision. And no other evidence to rebut the presumption of such revocation shall be received."

The special guardian's objections do not distinctly indicate whether the marriage between the decedent and Amelia Steel is claimed to have taken place before the execution of the *codicil* or after. They may be so amended as to contain a distinct allegation in this regard. If such amendment shall be made, and it shall be averred that the execution of the *codicil* preceded the marriage, the present motion in behalf of the proponent must be denied, otherwise it must be granted.

MATTER OF CLARK.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—March, 1887.

MATTER OF CLARK.

*Matter of the estate of LEMUEL B. CLARK,
deceased.*

judgment entered, pursuant to Code Civ. Pro., § 763, against a party in an action, after his death, occurring subsequently to interlocutory judgment against him, has under 2 R. S., 87, § 27, subd. 3, when entered, the same force and effect, as regards title to priority in lien, as if decedent had died on the day before its entry.

OBJECTION by judgment creditor for decree directing payment of his claim.

SECOR & PAGE, for petitioners.

WATERBURY, for respondent.

SURROGATE.—These petitioners in the lifetime of decedent brought an action against him. He demurred. His demurrer was overruled. Interlocutory judgment was entered against him May 29th, 1886. That judgment granted him leave to withdraw his demurrer and to answer within ten days, on payment of costs. It directed that in default of failure to comply with its provisions final judgment should be entered against him, in favor of the plaintiff, to recover the sum of \$1,500, with interest. Before the expiration of the twenty days, and on the 9th day of June, 1886, Mr. Clark died. Final judgment was, nevertheless, entered against him on June 19th, 1886, pursuant to the pro-

visions of §§ 763 and 1021 of the Code of Civil Procedure.

The judgment creditors seek, by this present proceeding, to obtain a decree directing the respondent, who is the executrix of the judgment debtor's estate, to pay the amount of their judgment. The respondent's answer shows that, unless the claim of these petitioners is entitled to preference over specialty and simple contract debts, no direction for its satisfaction can now be made without imperiling the rights of other creditors entitled to equality of payment.

The order of priority which the representative of an estate must observe in the payment of debts is prescribed by § 27, tit. 3, ch. 6, part 2, R. S. (3 Banks, 7th ed., 2298). It is as follows:

“*First.* Debts entitled to a preference under the laws of the United States.

Second. Taxes assessed upon the estate of the deceased previous to his death.

Third. Judgments docketed and decrees enrolled *against the deceased* according to the priority thereof respectively.”

It is judgments “against the deceased,” it will be observed, and not judgments “against the executor or administrator of the deceased,” that are thus preferred above recognizances, bonds, notes, etc., which make up class *fourth*. It is indeed expressly declared in the next succeeding section (§ 28) that the obtaining a judgment against a decedent's executor or administrator upon a debt to the decedent shall not “entitle such debt to any preference over others of the same class.” But it is provided by § 763 (*supra*) that “if either

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party to an action dies after an accepted offer to allow judgment to be taken, or after a verdict, report or decision, *or an interlocutory judgment*, but before final judgment is entered, the court must enter final judgment *in the names of the original parties.*"

Of such a character was the final judgment whose payment is now sought, following as it did an interlocutory judgment within the meaning of § 1021 (*supra*), which declares that the decision of the court upon the trial of a demurrer must direct the final or interlocutory judgment to be entered thereupon. Where it directs an interlocutory judgment with leave to the party in fault to plead anew or amend it may also direct that final judgment be entered if the party in fault fails to comply with any of the directions given or terms imposed.

Section 1210 provides that "where a judgment for a sum of money or directing the payment of money is entered against a party after his death a memorandum of the party's death must be entered with the judgment in the judgment book," etc. "Such a judgment" the section proceeds to say "does not become a lien upon the real property or chattels real of the decedent, *but it establishes a debt to be paid in the course of administration.*"

Section 763 (*supra*) is founded upon sec. 4, tit. 1, ch. 7, part 3, R. S. (3 Banks, 5th ed., 669), which declares that "after a verdict shall be rendered in any action, and after a plea of confession in a suit brought, if either party die before judgment be actually entered thereon, the court may, within two terms after such

MATTER OF CLARK.

verdict or plea, enter final judgment in the names of the original parties."

Section 1210 (*supra*) is a substantial re-enactment of § 7, tit. 4, ch. 6, part 3, R. S. (3 Banks, 6th ed., 638). The concluding paragraph of the latter section is almost literally the same as the concluding paragraph of § 1210.

In *Nichols v. Chapman* (9 *Wend.*, 452, 456) it was held that a judgment entered after the death of the party against whom it had been obtained, was entitled to priority of payment over simple contract debts, being a judgment by relation against the deceased in his lifetime (see also *Salter v. Neaville*, 1 *Bradf.*, 488; *Barnes v. Weisser*, 2 *Bradf.*, 212; *Mills v. Jones*, 2 *Rich. S. C. Law*, 393).

I am referred by the respondent's counsel to *Matter of Clark* (15 *Abb. Pr.*, 227), which contains an intimation of CLERKE, J., at variance with the doctrine of the foregoing cases, but the intimation is *obiter* and is made without argument or citation of authority.

In *Burnet v. Holden* (1 *Lev.*, 277) judgment upon a verdict in *assumpsit* had been obtained after the defendant's death and before the day in *banc*. The plaintiff brought *scire facias* against the defendant's executor. The executor pleaded a debt due to himself, and insisted that, by right of his executorship, he could lawfully apply the assets of the estate to the satisfaction of his own claim, in preference to the claim of the plaintiff which had not been pressed to final judgment in the defendant's lifetime. Judgment was given for the plaintiff. The doctrine of the case just cited was upheld in *Colebeck v. Peck* (2 *Ld. Raym.*,

MATTER OF MILLER.

1280), and in *Saunders v. McGowran* (12 *M. & W.*, 221).

In *Ainslie v. Radcliff* (7 *Paige*, 439), Chancellor WALWORTH declared that the direction usually contained in decrees for the distribution of a decedent's personal assets among his creditors—*i. e.*, “to pay the debts in due course of administration”—was a direction, *not* to disregard legal priorities, but rather to respect them, and to satisfy the debts accordingly.

I have no hesitation in holding that the judgment here in question, if it has been duly docketed as the statute directs, has precisely the same force and effect that it could claim if this decedent had died on the day after its entry.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—March, 1887.

MATTER OF MILLER.

*In the matter of the estate of JOSEPH E. MILLER,
deceased.*

A policy of insurance upon the life of a decedent, who at the time of his death was not a resident of the State, issued by a domestic corporation having its principal office in New York county, is an asset which, under Code Civ. Pro., § 2478, confers jurisdiction upon the Surrogate's court of that county to grant letters of administration of the estate, though the instrument is without the State at the time of the application.

MATTER OF MILLER.

APPLICATION for letters of administration of decedent's estate.

JOHN W. FISKE, *for foreign administrators.*

FERNANDO SOLINGER, *for petitioner.*

THE SURROGATE.—This decedent died without this State, being at the time of his death a non-resident. Under subd. 3 of § 2476 of the Code of Civil Procedure, therefore, the Surrogate's court of this county has authority to grant letters of administration upon his estate in case he left personal property within this county and no other. I am asked to grant such letters upon the application of a creditor.

The asset which is asserted to be the basis of jurisdiction is a claim against the Mutual Life Insurance Company whose principal office is in this city. That corporation issued, on March 27th, 1873, a policy of insurance for \$1,000 upon the life of the decedent, payable at their office in New York to the decedent's executors, administrators or assigns in sixty days after proof of his death. The policy is now in Maine, in the possession of one Frederick V. Chase, heretofore appointed administrator of this estate by the judge of probate of Cumberland county in that state.

It is provided by § 2478 of the Code of Civil Procedure that, "for the purpose of conferring jurisdiction upon a Surrogate's court, a debt owing to a decedent by a resident of the State is regarded as personal property situated within the county where the debtor resides; and a debt owing to him by a domestic corporation is regarded as personal property situated within the county where the principal office

MATTER OF EISNER.

of the corporation is situated. But the foregoing provision does not apply to a debt evidenced by a bond, promissory note or other instrument for the payment of money only, in terms negotiable or payable to the bearer or holder. Such a debt is, for the purpose of conferring jurisdiction, regarded as personal property at the place where the bond, note or other instrument is, whether within or without the State."

Now in my view the claim here in question is not "a debt evidenced by an instrument for the payment of money which is in terms negotiable or payable to the bearer or holder." I hold, therefore, that it must be deemed an asset of the estate within this county, and letters must be granted accordingly.

They may issue to the intestate's widow, or, if she will not accept the same, to the public administrator (Matter of Williams, *ante*, 292).

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—March, 1887.

MATTER OF EISNER.

In the matter of the estate of ELIZA EISNER, deceased.

A Surrogate's court has the same authority to determine a disputed claim by or against the accounting party, upon the settlement of the account of a temporary administrator, as upon that of an executor or administrator in chief.

This includes the competency to adjudicate upon a claim of a debt alleged

MATTER OF EISNER.

to be due to the estate of the decedent, from the temporary administrator, and others jointly.

A temporary administrator appointed, under Code Civ. Pro., § 2668, subd. 1, "where delay necessarily occurs in the granting of letters testamentary," etc., goes out of office, of course, upon the issuance of permanent letters, but his official bond is not *ipso facto functus officio*.

PENDING a controversy over the probate of this decedent's will, one of her sons was appointed temporary administrator of her estate. Upon this accounting, after the will had been admitted to probate and letters testamentary had been issued to its executors (one of whom was the temporary administrator himself), the contestants sought to introduce before the referee to whom the issues of the accounting had been submitted, certain testimony tending to show that a firm whereof the temporary administrator was a member was indebted for rents due upon property of the estate which such firm occupied under a lease.

It appeared that the firm admitted its liability in a certain sum, but that the objectors to the account insisted that it was liable in a larger sum. The referee held that the Surrogate had no jurisdiction to determine the question of the firm's indebtedness. Motion was now made to confirm the referee's report.

GEORGE W. CARR, *for administrator*.

BENNO LOEWY, and GEO. P. AVERY, *for objectors*.

S. OPPENHEIM, *special guardian*.

THE SURROGATE.—Section 2739 of the Code provides that whenever, upon the judicial settlement of the account of an *executor or administrator*, "a contest arises between the accounting party and any of the other parties . . . respecting a debt alleged to be

MATTER OF EISNER.

the accounting party to the decedent or by decedent to the accounting party, the contest is tried and determined in the same manner as every issue arising in the Surrogate's court."

This section applies, I think, to temporary administrators as well as to executors and administrators in Article 2d., tit. 4, chap. 18 of the Code of Civil Procedure. It contains the only statutory provisions regulating executors' and administrators' accountings, and, even though those provisions are broad enough to cover the accountings of temporary administrators, there is a *missus* in the statute.

Section 2724 provides the procedure for the compulsory accounting of an "executor or administrator."

Section 2725 declares that a "Surrogate's court may order a judicial settlement of the account of a temporary administrator *at any time*." This section contains no reference whatever to executors or to administrators in chief.

Section 2726 provides that "a petition praying for a judicial settlement of an account, and that the executor or administrator may be cited to show cause why he should not render and settle his account, may be presented in the case prescribed in either of the preceding sections," etc.

It is therefore, apparent that so far as compulsory accountings are concerned, the term "administrator" is understood to include the term "temporary administrator." I cannot doubt that the authority of the Surrogate upon the accounting of a temporary administrator is substantially the same as his authority

upon the accounting of an executor or administrator in chief.

Now it was held by the Court of Appeals, in the case of *Shakspeare v. Markham* (72 *N. Y.*, 400), that under the provisions of the Revised Statutes relating to the mode of proving the claim of an executor or administrator against his decedent's estate (§ 33, tit. 3, ch. 6, part 2, R. S.; 3 Banks, 5th ed., 175), the Surrogate had jurisdiction to hear and determine "all claims in which an executor was interested" and that the "circumstance that he is *jointly* interested in the demand does not affect the authority of the Surrogate to adjudicate with regard to it."

I have found no decision as to the jurisdiction of the Surrogate, upon the accounting of an executor or administrator, to pass upon the claim of the estate of the accounting party's decedent against a firm of which the accounting party had been a member; but it seems to me that since the taking effect of § 2739, the reasoning of *Shakespeare v. Markham* is as applicable where the accounting party is a debtor as where he is a creditor of his decedent's estate.

Exception is taken to the referee's fourth conclusion of law to the effect that the temporary administrator, upon making the payments which shall be directed by the decree settling his account, and upon delivering the property of the estate to the executors, is entitled to his discharge and to the revocation of his letters. It is claimed that his responsibility will not determine until the administration of the estate shall be completed, unless before that time his letters shall be revoked in a proceeding brought expressly

MATTER OF EISNER.

for such revocation by some person interested in the estate.

I think that this position is unsound. Section 2684 of the Code of Civil Procedure provides that where, after the issuance of letters of administration on the ground of a decedent's intestacy, his will shall be admitted to probate and letters testamentary thereon shall be granted, the decree according probate must revoke the former letters. I doubt whether any reason can be suggested why this provision should have been limited to letters of administration granted on the ground of intestacy, except this: that there is involved in the very term "temporary administrator" the notion that the authority of such an officer is extinguished by the issuance of letters testamentary or letters of administration.

Section 2685 of the Code of Civil Procedure provides for the compulsory revocation of the letters of an "executor or administrator." In the eighth subdivision of that section there is an express reference to temporary administrators. This reference serves to indicate that such officers are included within the general term "administrators." But this subdivision provides only for the case of temporary administrators appointed under the *second* subdivision of § 2668—that is, of temporary administrators upon the estates of absentees.

This circumstance confirms me in the opinion that temporary administrators appointed under the *first* subdivision of § 2668 go out of office as of course upon the issuance of permanent letters (Matter of Lewis, 17 *Week. Dig.*, 311).

MATTER OF RUSSELL.

I decline, however, to cancel the administrator's bond (Code Civ. Pro., § 2596).

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—April, 1887.

MATTER OF RUSSELL.

In the matter of the estate of DAVID RUSSELL, deceased.

The possibility that an event, upon which a testamentary limitation, suspending the absolute ownership of personal property, is to determine, may occur later than at the expiration of two lives in being at the death of the testator, avoids the disposition.

Testator, by his will, gave the residue of his estate to his executor, in trust, to sell the same, invest the proceeds, and pay out of the income a life annuity to A. and B., respectively, and the balance to his daughter C., for life; providing that, as A. and B. should severally die, their annuities should fall into the income payable to C.; and upon C.'s death, the principal, "as the same is relieved from the payment of the life interest" mentioned, be divided among specified persons.—

Held, that, inasmuch as, if C. survived neither or both of the annuitants, no distribution could be effected until the termination of the third life; while no intimation was given as to what portion of the principal should be "relieved" upon the death of C. and one annuitant, the scheme was wholly invalid, as being in contravention of the statute (1 R. S., 773, § 1).

Moore v. Hegeman, 72 N. Y., 376; Monarque v. Monarque 80 *id.*, 320—distinguished.

CONSTRUCTION of will, upon application for probate.

JOHN J. ROCHE, *for proponent*.

FOSTER & THOMSON, *for contestants*.

THE SURROGATE.—By the second clause of the in-

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strument, the validity of whose provisions is here in issue, this testator gives his entire residuary estate to his executor in trust, with power to sell and to invest the proceeds of sale, and to collect and receive the income, interest, rents, etc., of such property or proceeds, and with the following directions as to distribution :

“I do direct that from the net income, interest money, rents and dividends collected and received as aforesaid, my trustee do pay to my sister, Jane R. McAllister, the annual sum of one hundred and twenty-five dollars during her life ; and that my said trustee do pay to my brother, William Russell, the annual sum of one hundred and twenty-five dollars during his natural life ; and that my said trustee do pay all the rest, residue and remainder of said income, interest money, rents and dividends, as the same are collected and received, to my daughter, Mrs. Isabella Home, for and during the full end and term of her natural life.

“It being my will, and I do direct that, upon the decease, respectively, of my said sister, Jane, and my brother, William, the amounts of money directed to be paid to each of them respectively, as aforesaid, be paid as part of the income of my residuary estate to my aforesaid daughter, Isabella, the same as the income of the other parts of said residuary estate are hereinbefore directed to be paid to her.

“It is my further will and I direct that *upon the decease of my said daughter* the principal of my estate as the same is relieved from the payment of the life interests, as herein provided, by the deaths respec-

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tively of the persons for whose benefit the same are respectively created, be divided equally, share and share alike, by and between certain specified persons."

It is claimed on behalf of the testator's daughter, Mrs. Home, that these dispositions, which admittedly concern personal property alone, are in contravention of the provisions of § 1, tit. 4, ch. 6, part 2, R. S. (3 Banks, 7th ed., 2256), and are therefore ineffectual and void. The language of that section is as follows":

"The absolute ownership of personal property shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a will, for not more than two lives in being at the death of the testator."

In determining whether the provisions in dispute are valid or invalid, it is essential to inquire in the first place what it is that they seek to accomplish. Whether they are in harmony with the statute or at odds with it, is a question whose consideration should be postponed until we have discovered precisely what they mean (*Van Nostrand v. Moore*, 52 *N. Y.*, 12; *Colton v. Fox*, 67 *N. Y.*, 343).

We must first ascertain the intention of testator, or more properly the meaning of his words, in the clause under consideration, and then endeavor to give effect to them, so far as the rules of law will permit. Our first duty is to construe the will; and this we must do, exactly in the same way as if the rule against

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perpetuity had never been established, or were repealed when the will was made; not varying the construction in order to avoid the effect of that rule, but interpreting the words of the testator wholly without reference to it (*Lord Dungannon v. Smith*, 12 *Cl. & Fin.*, 399).

Now it is obvious that the testator intended that his residuary estate should be kept as one undivided fund so long as his daughter should live. Whether either or both of the annuitants should die in her life-time, or whether, on the other hand, both should survive her, it was manifestly his purpose that the entire property should be held by the executor until her death. Not until the arrival of that period is any distribution of the *corpus* to be effected, and not until then is any portion of the residue to be relieved from the charge of contributing from its income to the various beneficiaries.

In the event that one of the annuitants shall die before the testator's daughter, the entire estate must be retained by the executor for yielding income for the daughter and the surviving annuitant. In the event that such surviving annuitant shall thereafter die while the daughter is yet living, the whole estate must be retained until the daughter's death. If the daughter shall die after the death of one of the annuitants and in the lifetime of the other, it is *certainly* true as regards a part of the estate, and is, *perhaps*, true as regards all, that no distribution can be effected until the termination of the third life.

A similar situation will arise in case the daughter shall predecease both annuitants, which seems to be

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the contingency that the testator specially had in mind. He declares that upon his daughter's decease, the principal of his estate "*as the same is relieved* from the payment of the life interests, by the deaths respectively of the persons for whose benefit the same are respectively created," shall be distributed, etc. But the will gives no intimation as to what portion of the principal shall be "relieved" upon the death of the daughter and one of the annuitants, and what portion shall be thereafter retained for the benefit of the surviving beneficiary.

To hold that one half part of the estate would then become distributable would be to hazard a guess as to the testator's meaning rather than to put a fair interpretation upon his language. Even these vague directions, as to a separation of the estate into shares, and the exoneration of some portion of it from the charge of producing income for the several beneficiaries, were not intended to be effectual, as has been already intimated, until after the death of the daughter, even though that event should not occur until after the death of both annuitants. This case does not, therefore, fall under the protection of *Moore v. Hegeman* (72 *N. Y.*, 376), or of *Monarque v. Monarque* (80 *N. Y.*, 320).

If there is a possibility that the event upon which a limitation is made to depend may exceed in point of time the period authorized by law, that is a fatal circumstance. A limitation is effectual only when it must of necessity take effect within the compass of two lives in being at the testator's death (*Hawley v. James*, 16 *Wend.*, 61; *Schettler v. Smith*, 41 *N. Y.*,

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328; Knox v. Jones, 47 N. Y., 389; Shipman v. Rollins, 98 N. Y., 311).

Such is not the character of the limitation here under discussion. The provision creating it, and creating the trust respecting the income, must therefore be pronounced void.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—April, 1887.

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In the matter of the estate of GEORGE E. THOMPSON, deceased.

It is not essential to the validity of a bequest, that a testator should use the word "give" or "bequeath," or other expression of similar significance.

Testator, who, at the time of the execution of his will, in 1876, was indebted to A., in the sum of \$1,650, by that instrument provided that, out of the proceeds of his estate, A. was "to receive" such sum "being the amount of borrowed money due her," making reference to a note held by A. therefor. The executor having filed his account, in 1886, for judicial settlement, A. sought to procure payment of an unpaid balance of her claim.—

Held, that the provision, in the will, in favor of A., was a legacy in satisfaction of a debt; and that, by virtue of Code Civ. Pro., § 1819, the statute of limitations had not yet commenced to run against her demand.

It seems, that, even if A. were properly to be regarded as a creditor, and not a legatee, a credit given to the executor, with his assent, before the claim was barred, as for a payment on account thereof, though no money was actually paid, would, under the provisions of Code Civ. Pro., § 395, stop the running of the statute.

HEARING of exceptions to report of referee to whom

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were referred the account, and objections thereto, of the executor of decedent's will, in proceedings for judicial settlement.

A. J. PROVOST, *for executor.*

C. H. JACKSON, and W. T. B. MILLIKEN, *for objectors.*

JOHN MCCBONE, *special guardian.*

THE SURROGATE.—The will of this testator directed his executor to reduce his entire estate to money and to dispose of the proceeds as follows:

“*First.* My wife *to receive* \$100 in cash . . .

“*Third.* My mother *to receive* the sum of \$1,650, being the amount of borrowed money due her; also interest on the same as may appear by my note held by her for above amount.

“*Fourth.* All the balance of my estate, after paying the items hereinbefore named, shall be paid to my wife and my child, the same to be divided equally between them.”

At the date of this will (March 7th, 1876), the testator was in fact indebted to his mother in the sum of \$1,650 for borrowed money, and that indebtedness was evidenced by his two promissory notes, one for \$1,150, dated September 1st, 1874, and the other for \$500, dated January 1st, 1876. He died in August, 1876. His mother died in March of the year following; the notes in question thereupon came to the hands of her executor, one Keese. At various times, prior to April, 1880, Keese received from this decedent's executor (Armstrong) sums of money amounting in all to \$200, in part satisfaction of the claims of

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the estate of the testator's mother against the estate of the testator himself.

Subsequently Keese and Armstrong had with each other certain personal business transactions, upon the settlement of which, on May 31st, 1883, it was ascertained that the former was indebted to the latter in the sum of \$13.44. Instead of discharging this indebtedness by the actual payment of money, Keese, with Armstrong's approval, credited this estate with payment of a like sum in part satisfaction of the aforesaid claim of the testator's mother. On October 14th, 1886, Armstrong filed in this court an account of his administration. Certain objections were interposed, and the issues thus raised were submitted to a referee, whose report is before me for confirmation.

The referee finds that the provision in the third clause of the will (*supra*) is in the nature of a legacy, and that, even if this were not the case, the claim of Sarah Thompson's estate, as a creditor of this decedent, would not be barred by the Statute of Limitations. The latter finding involves the notion that the transaction between Armstrong and Keese above referred to must be treated as, in substance, a *payment* of \$13.44 by the former as decedent's executor to the latter as executor of the decedent's mother. I think that the referee has reached a correct conclusion.

It is not essential to the validity of his bequests that a testator should use the word "give" or the word "bequeath" or any other word of similar significance. The very terms employed by this testator, in the article of his will now under consideration,

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were held in *Miars v. Bedgood* (9 *Leigh*, 361) to constitute a legacy. PARKER, J., pronouncing the opinion of our Court of Appeals in *Orton v. Orton* (3 *Keyes*, 486), approves the definition of a legacy, which is to be found in Bacon's Abridgement—viz.: a "gift or bequest by testament"—and declares that "the word gift is not limited in its meaning to a gratuity, but has the more extended signification of *a thing given*, either as a gratuity or as a recompense."

I think that the provision here in dispute is a legacy in satisfaction of a debt and that, in view of § 1819 of the Code of Civil Procedure, the Statute of Limitations has not as yet begun to run against the representative of the deceased legatee.

Nor is the enforcement of the claim of Sarah Thompson's estate barred by the Statute of Limitations, even though the claim be regarded not as a legacy but as a debt. In May, 1883, it would have been entirely proper for Armstrong to have satisfied it in whole or in part, whether he had or had not been at that time in possession of funds belonging to the estate; and if he had made payments out of his own pocket he would thereby have entitled himself to reimbursement out of the estate moneys thereafter coming to his hands.

If Keese had actually paid Armstrong the sum of \$13.44 and Armstrong had handed back to Keese the identical money on account of the Sarah Thompson claim, it cannot be doubted that the transaction would have taken the claim out of the operation of the Statute of Limitations. And this was in effect what actually took place.

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Section 395 of the Code of Civil Procedure, which makes an acknowledgment or promise contained in a writing, signed by the party to be charged thereby, the only competent evidence of a new or continuing contract, whereby to defeat the Statute of Limitations, expressly declares that *this section does not alter the effect of a payment of principal or interest.*

“Payment of a debt,” says the Court of Appeals of Virginia, in *Huffmans v. Walker* (26 *Gratt.*, 314), “is not necessarily a payment of money, but that is payment which the parties contract shall be accepted as payment.”

It was held in *Maber v. Maber* (*L. R.*, 2 *Exch. Cas.*, 153), that in determining whether a transaction claimed to be a payment has had the effect of taking the case out of the Statute of Limitations, the true test is this: Would the transaction have supported a plea of payment if the creditor had brought an action? Tried by this test, the present case seems to me a plain one. In its essential features it closely resembles the last one cited. See, also, *Hooper v. Stephens* (4 *Ad. & El.*, 71); *Bodger v. Arch* (10 *H. & G.*, 333); *Amos v. Smith* (1 *H. & G.*, 238).

I do not think it necessary to discuss any of the other exceptions to the report of the referee. The report is in all things confirmed.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—April, 1887.

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In the matter of the estate of JOHN F. DELAPLAINE, deceased.

The provisions of the Code of Civil Procedure, regulating the probate of wills in a Surrogate's court, contemplate an expansion, rather than a contraction, of the authority which such a court possessed, in this respect, under the statutes previously in force.

A Surrogate's court has jurisdiction to take proof of a will, not produced before it, where the original "is in another State or country, under such circumstances that it cannot be obtained" for the purpose of such production. The provision of Code Civ. Pro., § 1861, subd. 1, that a civil action may, in such a case, be maintained to establish the will, does not, by implication, oust those courts of jurisdiction affirmatively and generally conferred by *id.*, §§ 2472 and 2476.

Russell v. Hartt, 87 N. Y., 9—followed.

Such a court has also jurisdiction to take proof of the will of a non-resident testator, executed, without attestation of witnesses, at the place of his domicile, by the law whereof attestation was not required to validate the testamentary act.

APPLICATION for probate of codicil to decedent's will.

HENRY W. TAFT, *for petitioners.* —

BILLINGS & CARDOZO, JOSEPH A. WELCH, L. B. CHASE, and G. R. SCHIEFFELIN, *for other parties.*

WM. H. HAMILTON, *special guardian.*

THE SURROGATE.—Amelia A. Stolzel and Arthur F. Stolzel, as devisees and legatees under an instrument claimed to have been executed by this decedent on

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July 17th, 1883, as a second codicil to a paper heretofore admitted to probate as his last will and testament, commenced in June last a proceeding in this court for the probate of such second codicil.

It is alleged in their petition that the decedent died in February, 1885, in the city of New York; that he left in the said city personal assets of great value; that the paper under which the petitioners claim came into being in the city of Vienna, in the Empire of Austria; that it is holographic, and bears the signature of decedent as its maker; that though it does not purport to have been executed in the presence of any person as a subscribing witness, it is nevertheless valid and effectual, because it was executed in accordance with the laws of the said Empire of Austria, in which decedent then had his residence and permanent domicil; that it is not produced before the Surrogate, for the reason that it is in the possession of a certain Austrian court in the petition specified, which court will not suffer it to be removed from its files. Answers have been interposed on behalf of certain persons interested under the will as proved.

It is insisted by the respondents that this court is without jurisdiction in the premises, 1st, Because of the non-production of the instrument whose probate is sought; and 2d, Because of the conceded fact that such instrument is without subscribing witnesses.

First. Is the actual production of a testamentary paper before the Surrogate essential to the exercise of his jurisdiction to grant or to refuse probate? Certainly not in all cases. Section 2621 of the Code of Civil Procedure expressly declares that "a lost or

destroyed will " can be proved in a Surrogate's court. But the respondents claim that only such cases as are covered by § 2621 are excepted from what they insist is the general rule, that without the physical presence of the paper sought to be established as a will the Surrogate is powerless to adjudicate upon its title to probate.

If there had been no change in the statutes touching the jurisdiction of this court since the arising of the situation upon which the Court of Appeals comments in *Russell v. Hartt* (87 *N. Y.*, 19), the question here presented would be susceptible of an easy solution. The situation was as follows: The Surrogate of Ulster county had admitted to probate an instrument that had never been produced before him, and that could not be produced for the reason that it was in the custody of a court in Scotland which refused to give it up. That instrument disposed of real and personal property in Scotland and of other real and personal property in the State of New York. It had been executed in accordance with the formalities both of the Scotch law and of the law of this State. The subscribing witnesses were examined in Scotland under a commission issued by the Surrogate, and their depositions were admitted at the trial and constituted the evidence by which the decree appealed from was supported.

In the course of an opinion in which all his associate judges concurred, FINCH, J., pronounced chapter 460 of the act of May 16th, 1837, broad enough in its terms to authorize the Surrogate to take proofs of an existent will without requiring its production. The

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provisions to which the learned Judge referred were manifestly those contained in the 1st, 71st and 77th sections of the act.

Section 1st gave to the Surrogate of each county authority "*to take the proof of last wills and testaments of all deceased persons* in the following cases"—(naming them).

Section 71st expressly abrogated the limitation imposed upon the Surrogate's authority by § 1, tit. 1, ch. 2, part 3 of the Revised Statutes, to the effect that "no Surrogate shall, under pretext of incidental power or constructive authority, exercise any jurisdiction whatever not expressly given by some statute of this State."

Section 77th provided that, "on any proceeding or matter in controversy before a Surrogate, when the testimony of a witness in any other State or territory of the United States, or in any foreign place, is required by any party to such proceeding or controversy, the Surrogate may issue a commission to take such testimony."

The act of 1837 was repealed in terms by the general repealing act of May 10th, 1880 (L. 1880, ch. 245), but the provisions upon which rests the decision in *Russell v. Hartt*, were substantially re-enacted in the Code of Civil Procedure:

(1). Section 1 of the old law reappears as § 2476 of the Code. To the Surrogate's court of each county the latter statute gives "jurisdiction, exclusive of every other Surrogate *to take the proof of a will* in either of the following cases"—(specifying them).

A comparison of the language just quoted with the

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language of § 1 of the act of 1837, *supra*, does not even faintly suggest the notion that by the later statute the legislature intended to restrain the Surrogate's probate jurisdiction within narrower limits than had been fixed by the earlier. *Unqualified* authority "to take the proof of a will" would surely be no less comprehensive than *unqualified* authority "to take the proof of last wills and testaments of all deceased persons;" and while the authority conferred by neither of the statutes under consideration is unqualified, but in both of them is limited to certain specified "following cases," it will appear, when the two sets of "following cases" are juxtaposed, that while the field of the Surrogate's jurisdiction has been in no respect narrowed, it has been in some respects enlarged by the later enactment.

(2). It cannot be claimed that any change has been wrought in the character and the extent of the authority of this court by the repeal of § 71 of the act of 1837, which itself repealed the inhibition of the Revised Statutes against the exercise by the Surrogate of "incidental powers;" for, by subdivision 11 of § 2481 of the Code, the Surrogate is authorized "to proceed in all matters subject to the cognizance of his court," where it is not otherwise prescribed by statute, "according to the course and practice of a court having by the common law jurisdiction of such matters, and to exercise such incidental powers as are necessary to carry into effect the powers expressly conferred." It is true that § 2472 of the Code, which is now the source of the Surrogate's general jurisdiction, and which in its first subdivision empowers him

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“to take the proof of wills,” and “to admit wills to probate,” declares in its concluding sentence that the jurisdiction thus conferred “must be exercised in the cases and in the manner prescribed by statute.” But a like restriction, in words almost identical, was imposed by § 1, tit. 1, ch. 2, part 3 of the Revised Statutes (3 Banks, 6th ed., 326), and remained unaltered upon the statute book until it was displaced by the corresponding provision of the Code.

(3.) Section 77 of the act of 1837 gave the Surrogate authority to issue commissions for the examination of witnesses in other States or countries. It will of course be conceded that powers no less ample are now conferred by the Code.

[See § 2538, making applicable to Surrogates' courts article 2d of tit. 3 of ch. 9, which relates to “depositions taken without the State for use within the State.”]

I have thus demonstrated that, if the decision in *Russell v. Hartt* is not to be taken as controlling my disposition of the principal matter here in controversy, it is for some reason quite apart from any supposed variations between those sections of the act of 1837 upon which the decision rests, and cognate provisions in the law as it stands to-day.

But the parties opposing the probate of the alleged codicil insist that lack of jurisdiction in the Surrogate's court to prove a testamentary paper not produced, and not sought to be established as lost or destroyed, is made apparent by reference to § 1861 of the Code. This section forms a part of art. 3, tit. 3, of ch. 15. The chapter is wholly concerned with certain special provisions regulating “*Actions* ;” the title is styled

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“*Actions* relating to the estate of a decedent;” the article is entitled “*Actions* to establish or impeach a will;” the section provides that in certain specified classes of cases one may maintain an *action* to procure a judgment establishing a will.

The first and second of these classes are described as follows: “Where a will of real or personal property or both has been executed in such a manner and under such circumstances that it might, under the laws of this State, be admitted to probate in a Surrogate’s court, but the original will,” *either* (a) “is in another State or country, under such circumstances that it cannot be obtained for that purpose,” or (b) “has been lost or destroyed by accident or design.” The third class is thus defined: “Where a will of personal property, made by a person who resided without the State at the time of the execution thereof, or at the time of his death, has been duly executed according to the laws of the State or country in which it was executed, or in which the testator resided at the time of his death, and the case is not one where the will can be admitted to probate in a Surrogate’s court under the laws of the State.”

The language of the first part of the first and the last part of the last subdivision certainly seems to involve the notion that inability to produce a will, because of its detention in another State or country, operates to prevent its admission to probate in a Surrogate’s court, even though that court would else have undoubted jurisdiction in the premises. If, however, the statutes which confer upon the Surrogate his authority in matters of probate, contain no such restric-

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tions and limitations as regards wills not produced in his court, but on the contrary, are couched in terms sufficiently broad and general to justify him in taking the proofs of such instruments, it is plain, I think, that he is not to be ousted of his jurisdiction by mere inference and implication from words used by the legislature in conferring jurisdiction upon other tribunals.

Suppose that, among the cases specified in § 1861, as warranting the maintenance of an action to establish a will, were the case following: "Where a will has been executed under such circumstances that it might under the laws of the State, be admitted to probate in a Surrogate's court, *but*" such will is worded in the German language, or is written on blue paper; it could scarcely be claimed that such a provision would, of itself, deprive the Surrogate of authority to take proof of wills written on blue paper, or of wills expressed in the German tongue. There is no such virtue in a *but*. And that "but" has no such virtue, as it is employed in this section, becomes manifest upon consideration of the last clause of its first subdivision—the clause relating to lost wills and wills that have been destroyed. The punctuation of the section is so faulty that upon a casual reading one may fail to note that that clause, like the one preceding, is connected with clause first by the word "but." [I have made that fact conspicuous by the insertion of the word "either" before the words "is in another State or country," in the foregoing quotation from the statute.]

The implication that procedure by action is the *only* procedure whereby lost and destroyed wills can

be proved, and that Surrogates' courts are therefore powerless in the premises, is no less definite and positive than the implication that an *action* is the only proceeding for establishing wills detained in a foreign state or country and for that cause not producible. But there is not the slightest ground for supposing that the legislature or the codifiers intended that the provision which thus empowers courts of general jurisdiction to establish a lost or destroyed will should be taken as involving a denial of like authority to the Surrogate. On the contrary, § 2621 of the Code, which went into operation simultaneously with § 1861, expressly provides that "a lost or destroyed will can be admitted to probate in a Surrogate's court." And it would appear from Mr. THROOP's note to § 1861 that the latter section does not embody an afterthought of the codifiers, but that when the phraseology of the earlier was under consideration, the commissioners had in mind the extension to all Surrogates' courts, of that power of proving lost and destroyed wills which had been exercised by the Surrogate of this county since 1870.

That § 1861 should not receive the interpretation claimed for it by these contestants is apparent from another consideration. An examination of the statutes for which it has been substituted will show, that those statutes furnished the appellant in *Russell v. Hartt* with arguments against the authority there exercised by the Surrogate, no less forcible than the arguments based in the case at bar upon the supposed restrictive language of the Code.

Section 1861 is in the main a re-enactment, with

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modifications, of §§ 63*a*, 68*a* and 63*b*, tit. 1, ch. 6, part 2, R. S. (3 Banks, 6th ed., 70, 71).

Section 63*a* provided that "a will duly executed according to the laws of this State, where the witnesses to the same reside without the jurisdiction of this State, or a duly exemplified or authenticated copy thereof, where the original will is in the possession of a court or tribunal of justice in another country or State whence the same cannot be obtained, may be proved in the Court of Chancery, upon a commission to be issued for that purpose on application to the Chancellor." Section 68*a* provided that "wills of personal estate duly executed by persons residing out of the State, according to the laws of the State or country in which the same were made, may be proved under a commission to be issued by the Chancellor."

Neither of these sections contains any express reference to the circumstances to which they both owe their origin—the lack of power in the Surrogate's court of that time to issue a commission for the examination of witnesses without the State.

Sections 63*a*–68*a* did not form a part of the Revised Statutes as originally enacted but were inserted afterwards (§ 16, ch. 320, laws of 1830). In commenting upon their object and effect the Revisers say: "There was no provision in the old statutes, nor is any contained in the new, relative to the proof of foreign wills. The above sections will remedy the omission in a manner which, it is believed, will be entirely safe" (5 Edm. Stat., 631). The sections here referred to continued in force uninterruptedly until their repeal

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in 1880, and that too without any modification except such as was occasioned by the abolition of the Court of Chancery, and the transference of its powers and jurisdiction to the Supreme court (§ 16, ch. 280, laws of 1847).

That these sections lodged, first in the Chancery court and thereafter in its successor, exclusive jurisdiction of wills not producible because of their detention in a foreign tribunal, and of wills whose probate involved the examination of witnesses without the State, was strenuously urged before the Court of Appeals in *Russell v. Hartt*.

But FINCH J., pronouncing the court's opinion, expressly sanctions the contention of the respondent in that proceeding, that before the enactment of chapter 320 (*supra*), the Surrogate's court had had jurisdiction to take proof of foreign wills, and continued to have it thereafter, but that this jurisdiction was "so hampered and rendered ineffectual, in cases where the witnesses could not be produced, by the inability of the court to issue a commission, as to make necessary and occasion" the grant of authority to the Chancellor. This view of the matter was very clearly and forcibly enunciated by Surrogate BRADFORD in *Isham v. Gibbons* (1 *Bradf.*, 69), cited with approval in *Russell v. Hartt*.

I am satisfied that there are no such differences between §§ 63*a*–69*a*, as thus construed, and § 1861 of the Code, as to warrant the notion that, by the latter enactment, the legislature intended to hedge about the probate jurisdiction of the Surrogate with restrictions such as had never theretofore been imposed.

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Counsel for the contestants lay some stress upon the direction contained in § 2635 of the Code, to the effect that except where special provision is otherwise made by law, a written will, after it has been proved, "must be retained by the Surrogate until the expiration of one year after it has been recorded and must then be returned upon demand to the person who delivered it," etc. This provision has taken the place of § 54, tit. 1, ch. 6, part 2, of the Revised Statutes (2 R. S., 66), which declared that "all wills, whenever proved according to law, except such as are required to be deposited, shall, after being recorded, be returned upon demand to the person who delivered the same," etc.

The language of § 2635 involves no stronger implication that the production of a will must precede its admission to probate, than is involved in the provisions above quoted from the Revised Statutes, and the latter provisions were in force when the will which occasioned the controversy in *Russell v. Hartt* was admitted to probate.

It would be profitless to make detailed comment upon the results of comparing, section by section, the terminology of the Code with that of the various statutes which it has supplanted. To any person who will undertake that comparison, it will clearly appear that, both in spirit and in letter, the later enactments contemplate an expansion rather than a contraction of the authority of this court. If there be any difference at all, therefore, between the present situation and that which existed at the entry of the decree in

Russell v. Hartt, it is a difference which makes the decision in that case all the more controlling in this.

Second. The claim that this proceeding should be dismissed because the codicil, for whose probate it asks, is unattested rests upon a very slender foundation. I have already referred to the provisions of §§ 2472 and 2476 of the Code of Civil Procedure, one of which gives to the Surrogates of the State general authority to "take the proof of wills" and "to admit wills to probate," and the other of which specifies the cases in which that authority may be exercised in any particular county by the Surrogate of such county.

One of the cases thus specified is described as follows: "Where the decedent, not being a resident of the State, died within that county, leaving personal property within the State." The case at bar, assuming, as it must of course be assumed for present purposes, that the allegations of the petition are true, indisputably falls within that description.

Now, there is in the Code another section (§ 2611) whose last five words are claimed to deprive Surrogates of the power of proving any wills whatever except such as are attested by at least two subscribing witnesses.

It is certainly the chief, if not the exclusive, purpose of the section referred to, to prescribe by what law, foreign or domestic, the validity of the execution of a will shall be tested. It substantially declares that a will of personal property shall be deemed sufficiently executed in any of the following cases:

(1). Where it has been executed in conformity with the laws of this State.

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(2). Where it has been executed without the limits of this State but in some other State of this country or in the Dominion of Canada or in the Kingdom of Great Britain and Ireland, and according to the laws of the place of its execution.

(3). Where it has been executed, not in conformity with the laws of this State but in conformity with the laws of its maker's residence.

Section 2611 is, in the main, a mere recasting of chapter 118 of the Laws of 1876, a statute which was in force from the time of its enactment until the adoption of the Code. It must certainly be admitted on all hands that, during this interval, the personal-property will of a decedent who resided at the time of its execution in any State or territory of this country, would have been admissible in a Surrogate's court, despite the non-observance by the testator of the formalities of execution prescribed by our own laws, if he had duly observed the formalities of execution prescribed by the law of his domicil.

Now, there were, during that interval, at least ten of the States and two of the territories of the United States in which holographic wills, that bore the name of no subscribing witness, were entitled to probate. And such is the case to-day. Those States and Territories are Arkansas, California, Dakota, Kentucky, Louisiana, Mississippi, Montana, North Carolina, Pennsylvania, Tennessee, Texas and Virginia.

If these contestants put a correct interpretation upon § 2611, an unattested holographic will, executed by a resident of any of those localities, must necessarily fail of probate in this court for the reason that the

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only provision for probate in that section is a provision that a will may be proved "*as prescribed in this article*" (art. 1, tit. 3, ch. 18) and that in such article, as they claim, no procedure is established for proving testamentary papers unattested by witnesses.

If the latter of these two contentions were strictly correct, it would not, in my judgment, follow that such wills must needs be rejected, unless in article 1, *supra*, or elsewhere upon the statute book, there appears some provision which prohibits their probate in Surrogates' courts. If general jurisdiction in the premises is lodged in those courts, and the legislature have neglected to point out the precise way in which that jurisdiction can be exercised, the Surrogate is at liberty to adopt such modes of procedure as the exigencies of the case demand. This would merely require a resort to the incidental powers with which he is vested by § 2481 of the Code (*Isham v. Gibbons, supra*; *Pew v. Hastings*, 1 *Barb. Ch.*, 452; *Brick's Estate*, 15 *Abb. Pr.*, 12; *Tompkins v. Moseman*, 5 *Redf.*, 402; *Kohler v. Knapp*, 1 *Bradf.*, 241; *Sipperly v. Baucus*, 24 *N. Y.*, 46).

In *Seaman v. Duryea* (10 *Barb.*, 523), affirmed in the Court of Appeals (11 *N. Y.*, 324), it was held that, although Surrogates' courts were courts whose jurisdiction was derived altogether from the statutes, nevertheless "the authority to do certain acts or to exert a certain degree of power, need not be given in express words. If the authority may be fairly and reasonably inferred from the general language of the statutes, or if it be necessary to accomplish its objects,

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and to the just and useful exercise of the powers expressly given, it may be taken as granted.”

In *Campbell v. Logan* (2 *Bradf.*, 90), Surrogate BRADFORD said: “The Revised Statutes define the jurisdiction of the Surrogate and direct its exercise ‘in the cases and in the manner prescribed by the statutes of the State,’ but the power to take the proof of wills being given generally, the mode of its exercise in a case not provided for by statute must be regulated by the court in the exercise of a sound discretion, according to the peculiar circumstances of each particular case.”

But not only is it true that no statute forbids the Surrogate to admit to probate an unattested will of personal property executed in accordance with the law of the testator’s domicile; it is also true that the procedure established by article 1, *supra*, does not pretend to relate exclusively to wills that have subscribing witnesses. Some of the provisions of that article, for example, §§ 2618, 2619 and 2620, especially concern wills of that description, and prescribe under what circumstances subscribing witnesses must be examined and under what circumstances their examination may be dispensed with. But other provisions of the article are broad enough to include every species of will covered by the terms of § 2611.

Section 2614 declares the requirements of the petition for probate. It contains no intimation of a limitation to attested wills.

Section 2622 establishes as the only prerequisite for the admission of any will described in § 2611 that the Surrogate shall “inquire particularly into all the

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facts and circumstances and be satisfied with the genuineness of the will and the validity of its execution." Section 2623 provides that "if it appears to the Surrogate that the will was duly executed, and that the testator was in all respects competent to make it, and was not under restraint, it must be admitted to probate."

I am of the opinion that neither of the objections of these respondents is well taken. They must, therefore, be overruled.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—April, 1887.

CHAMBERS v. CRUIKSHANK.

In the matter of the estate of JOHN F. DELAPLAINE, deceased.

The occasion for enforcing a joint custody of property, on the part of disagreeing executors, as permitted by Code Civ. Pro., § 2602, is properly deemed to have arisen, whenever the circumstances are such that joint custody pursuant to an agreement of the executors themselves would commend itself to the Surrogate as suitable and wise.

The purpose of the legislature, in enacting the section cited was expressly to modify the rule of law, according to which each of two or more co-representatives is entitled, in an ordinary case, to collect the decedent's personal estate, and hold it in his own possession, apart from the control of his associates.

APPLICATION by Talbot W. Chambers, one of the executors of decedent's will, for an order directing a deposit of money and property to the joint credit, and in the joint custody, of himself and his co-executor.

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JOSEPH A. WELCH, *for executor Chambers.*

BILLINGS & CARDOZO, *for executor Cruikshank.*

THE SURROGATE.—Section 2602 of the Code of Civil Procedure provides, among other things, that, where there is a disagreement between two or more executors of an estate, respecting the custody of its money or of its property, the Surrogate, upon the application of one or more such executors, “may, in his discretion, make an order directing that any property of the estate be deposited in a safe place, in the joint custody of the executors, or subject to their joint order, and that the money of the estate be deposited in a specified bank or trust company to their joint credit, and to be drawn out upon their joint order.”

The money and property of the estate of this testator are now under the exclusive control of one of its two executors, Mr. James Cruikshank. His co-executor, Mr. Talbot W. Chambers, seeks, by the present proceeding, to obtain an order directing that such money be deposited to the joint credit of himself and his associate, and that such property, other than money, be placed in the joint custody of the two, or subject to their joint order.

The testator's will was admitted to probate in 1885. In March, 1886, letters testamentary were issued to the respondent. The petitioner did not qualify as executor until September, 1886. Meanwhile the respondent had taken possession of the personal property of the estate, amounting in value to over \$125,000, and he had commenced an action for the construction of the testator's will, in which action the counsel

who represent him in the present proceeding had appeared in his behalf.

At some time prior to November 29th, 1886, the petitioner called upon the respondent for conference in the affairs of the estate, and communicated to him the fact that he, the petitioner, had retained counsel to aid in its administration. The respondent then protested that the counsel, whose services he had himself secured, prior to the petitioner's qualification as executor, were equal to the satisfactory performance of such legal services as the best interests of the estate would probably require. Subsequent to this interview, and on November 29th, the petitioner wrote the respondent, saying that, in view of the importance of the trusts committed to their joint care, and the extent of the property concerned, he "should feel safer" if his own attorney, in whom he had full confidence, should be employed as one of the counsel of the estate.

On November 30th, this attorney addressed a letter to the respondent, asking in the petitioner's behalf the payment of a retaining fee of \$1,000. A few days later the respondent replied to this letter as follows: "I respectfully decline to pay to you the sum named, or any part thereof, for the simple reason that your appointment was made without my knowledge or assent, or that of the counsel of the estate appointed by me at the time I was the sole qualified and acting executor."

On December 9th, the petitioner again wrote his co-executor, requesting payment of the sum of \$1,200 "to defray expenses of administration." The respondent, replying to this letter on December 14th, said:

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“As the sum for which you ask would be chargeable against me as executor, I beg to inquire the nature of the expenses for which the payment is to be made. Upon receiving this information I will confer with the counsel for the estate, and promptly act upon his advice in the matter.”

On December 17th, the petitioner answered to the effect that the sum for which he asked was to be expended in payment of his counsel; that his course in retaining such counsel was “an act of prudence,” and that he was empowered equally with the respondent to secure, at the charge of the estate, such legal services as its interests might seem to demand.

In a letter dated December 22d, the respondent declined to accede to the petitioner's request. On January 10th, 1887, the petitioner proposed in writing to the respondent that the assets in the latter's hands be placed under their joint control. By letter of January 17th, this proposition was rejected. On January 20th, the petitioner commenced the present proceeding.

Whatever doubts might have existed before the adoption of the Code of Civil Procedure respecting the authority of the Surrogate to make such an order as is here applied for, such authority is now expressly conferred by the above quoted provisions of § 2602. That section was evidently suggested to the Code Commissioners by decisions theretofore rendered in *Wood v. Brown* (34 *N. Y.*, 337) and in *Burt v. Burt* (41 *N. Y.*, 46).

In *Wood v. Brown*, the Court of Appeals had affirmed a judgment of the Supreme court, by which

it had been ordered, in an action between co-executors who had disagreed respecting the custody of estate funds, that such funds should be placed in a specified depository, subject to the joint order of the plaintiff and the defendant.

In *Burt v. Burt*, on the other hand, the Court of Appeals, upon a different state of facts, had sustained the Supreme court in its reversal of a judgment, directing, in an action brought by one of two executors against his associate, a joint deposit and joint custody of the assets of their testator's estate.

WOODRUFF, J., who pronounced the opinion of the court in the latter of these cases, declared that the decision in the former rested solely upon the ground that the conduct of the defendant executor was such as to jeopard the interests of the beneficiaries under the will.

In *Burt v. Burt*, the special relief sought by the plaintiff was the appointment of a receiver who should take possession of all the assets of a testator's estate, and practically expel from office the persons whom the testator had selected as his executors. The referee, before whom the cause had been tried, had pronounced against the plaintiff's demand for a receiver, but, under a claim for general relief, had found that the assets concerned in the litigation should be deposited in a specified bank, subject to the plaintiff's and the defendant's joint control.

The case was like the case at bar, and unlike that of *Wood v. Brown*, in the circumstance that no question was made respecting the safety of the fund involved or the responsibility of its custodian. It

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differed from the case at bar in the circumstance that the defendant executor had taken possession of such funds after his complaining associate had obtained letters testamentary and with such associate's knowledge and acquiescence.

In commenting upon these circumstances Judge WOODRUFF said: "Both of the executors could not have the actual manual keeping of this box of securities, each in his own possession. The defendant had the actual possession in the first instance without objection. He had as much right to retain that possession as the plaintiff had to demand it. The claim that the plaintiff was entitled to take it because he was co-executor, *ex vi termini* admits that the defendant would have been immediately entitled to take it again.

It is a well known doctrine of the law that where there are two or more executors of an estate "they are regarded but as one person representing the testator, and therefore the acts done by any one of them, which relate either to the delivery, gift, sale, payment, possession or release of the testator's goods, are deemed the acts of all; for they have a joint and entire authority." One of them is as much entitled as any of the others, in the absence of specific directions to the contrary, either in the will of their testator, or in the lawful order, judgment or decree of a competent court, to collect the personal estate and to hold it in his own possession, apart from the control of his associates (*Murray v. Blatchford*, 1 *Wend.*, 583, 616; *Hertell v. Bogert*, 9 *Paige*, 52; *Douglass v. Satterlee*, 11 *Johns.*, 16; *Sutherland v. Brush*, 7

Johns. Ch., 17; *Brennan v. Lane*, 4 *Dem.*, 322; *Hall v. Carter*, 8 *Ga.*, 388; *Wheeler v. Wheeler*, 9 *Cow.*, 34).

But it seems to me that, in the enactment of the provision upon which the present application is based, it was the express purpose of the legislature to modify the rule of law, which, but for that provision, might make such an application, either to the Supreme court or to the Surrogate, ineffectual.

In *Burt v. Burt*, the court said that, as the relations of the plaintiff executor and the defendant executor had ceased to be amicable, "it would have been altogether wise and suitable" if they had of their own motion made joint deposit of the funds which the testator had confided to their charge.

This suggests what seems to me the most satisfactory test by which to determine, in any given case, whether the discretionary authority, now expressly conferred upon the Surrogate by § 2602 of the Code, should or should not be exercised. The occasion for enforcing a joint custody is found to have arisen, whenever the circumstances are such that joint custody, pursuant to an agreement of the executors themselves, would commend itself to the Surrogate as suitable and wise.

Now, there is nothing in the will of this testator indicating that he reposed greater trust and confidence in one of the parties to this proceeding than in the other; there is nothing in the papers before me tending to show that it would impair the security of the property of the estate to take it from the sole custody of the respondent and place it in the joint custody of

himself and his associate. For aught that appears, they can meet together without inconvenience whenever conference or combined action shall be necessary or desirable. It is not shown that the interests of the estate would be prejudiced by requiring a joint custody of its assets. And there are certain considerations which seem to make such joint custody desirable.

By § 2736 of the Code of Civil Procedure, the executorial service that may be rendered in the administration of this estate, if its value above debts shall exceed one hundred thousand dollars, will be compensated by two full commissions. These commissions must be apportioned between the executors "according to the services rendered by them respectively." If this petitioner is willing and competent to perform his full share of the duty confided to him by the will, it is hardly just, unless it is unavoidable, to sustain the respondent, in a contention which will practically secure to him, besides the compensation that he would have been entitled to claim if the testator had named him as sole executor, a like compensation for excluding his co-executor from sharing in the administration.

The affidavits and the brief submitted on behalf of the respondent, disclose that he has what seems to me to be a mistaken notion as to the respective rights of the petitioner and himself in the employment of counsel. The counsel whom he has retained are repeatedly called "counsel for the estate," as distinguished from counsel employed by the petitioning executor. It is doubtless true that where one of several executors, who has alone qualified, has employed lawyers of learning and ability to represent the estate of his testator

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in the courts, the claim of another executor subsequently qualifying, to be reimbursed out of such estate for moneys expended in securing additional counsel, should not be allowed upon an accounting without strong evidence in its support; but in such a case counsel retained by the executor first qualifying are no more to be regarded as "counsel for the estate" than are counsel retained by such executor's associate.

Whether in the present case the petitioning executor has acted prudently and properly in calling additional counsel to his aid, need not now be considered. If the order to be entered upon this decision shall enable him to compensate such counsel out of estate funds, he will, of course, do so at the risk of a disallowance of any claim he may make for credit in that regard upon his accounting. His application, except as respects the rents of the testator's real property, is granted; as to such rents it is denied.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—May, 1887.

MATTER OF FOGG.

*In the matter of the estate of WILLIAM H. FOGG,
deceased.*

The rule whereby a legacy to a testator's widow, in lieu of dower, draws interest from the death of testator will be adhered to where the legatee, being also executrix, has, for the purpose of paying the legacy,

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converted securities left by the testator, provided no other funds were on hand available for the purpose, and proper regard was had to the interests of those entitled to the residue.

Matter of Gerard, 1 *Dem.*, 244—distinguished.

HEARING of exceptions to report of referee, to whom were referred the account, and objections thereto, of the executors of decedent's will, in proceedings for judicial settlement.

JOSEPH W. HOWE, *for executors.*

CHARLES E. HILL, *for other parties.*

THOMAS GREENWOOD, *special guardian.*

THE SURROGATE.—I am referred to no reported decision in this State which dissents from the doctrine of the cases cited below, that a legacy given by a testator to his widow, in lieu of dower, draws interest from his death, in the absence of some express or implied directions in his will to the contrary (Parkinson v. Parkinson, 2 *Bradf.*, 77; Seymour v. Butler, 3 *id.*, 193; Williamson v. Williamson, 6 *Paige*, 298, 305; Matter of Combs, 3 *Dem.*, 348; Pollard v. Pollard, 83 *Mass.*, 490). I find nothing in the terms of the will here under consideration calculated to take the legacy to this testator's widow out of the operation of the general rule as above stated.

The sums that have from time to time been applied to the satisfaction of the legacy in question seem to have been obtained by converting into money certain stocks, bonds and other securities left by the testator. It is not claimed that the accounting parties (one of whom is the legatee herself) made injudicious or improper selection of the time for effecting this conver-

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sion, or that such conversion was delayed in order that Mrs. Fogg might thereby gain some personal advantage, or that the best interests of the residuary legatees have not been at all times subserved by the course which the executors have pursued. Nor does it appear that, at the times when the several payments were made to Mrs. Fogg on account of her legacy, there were other funds in the hands of the accounting parties available for that purpose. In the latter circumstance alone, abundant reason is found for holding the decision in *Matter of Gerard* (1 *Dem.*, 244) inapplicable to the present situation. The objection that no interest should be allowed on the legacy to Mrs. Fogg since the expiration of a year from the testator's death must, therefore, be overruled.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—May, 1887.

MATTER OF MCGOVERN.

*In the matter of the estate of PHILIP MCGOVERN,
deceased.*

After a special proceeding for the probate of a will has been transferred to the court of Common Pleas, pursuant to Code Civ. Pro., § 2547, as amended in 1886, the Surrogate cannot be called upon, under *id.*, § 2618, to determine the question of the materiality of the testimony of a witness whom contestant desires to examine at the trial.

It seems, that an order is never necessary for the production of witnesses, under the section last cited.

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As to whether the provisions of § 2618, relating to the filing of a notice requiring the examination of witnesses to a will are applicable to the trial of probate controversies in the court of Common Pleas, *quære*.

APPLICATION for order requiring proponents of decedent's will to produce and examine witness on trial.

LEWIS SANDERS, *for the motion*.

RICE & BIJUR, *for proponents*.

THE SURROGATE.—A proceeding for the probate of an instrument purporting to be this decedent's will was lately transferred to the court of Common Pleas, in accordance with the provisions of § 2547 of the Code of Civil Procedure. Counsel for the contestants now make application in this court for an order requiring the proponents to produce and examine, at the trial in the court of Common Pleas, certain witnesses, whose testimony is claimed to be "material" within the meaning of § 2618 of the Code.

That section provides that "any party who contests the probate of a will may, by a notice filed with the Surrogate at any time before the proofs are closed, require the examination of all the subscribing witnesses to a written will or of any other witness whose testimony the Surrogate is satisfied may be material; in which case all such witnesses, who are within the State and competent and able to testify, *must* be so examined." Here, it will be observed, is a specification of two classes of witnesses; the first class consisting of subscribing witnesses to the will in controversy, and the second class consisting of persons, *not* subscribing witnesses, whose testimony may be deemed material by the Surrogate.

Now it is plain that, as regards subscribing witnesses, no order can ever be necessary for their production. By the very act of filing the notice prescribed in § 2618, a contestant in a probate controversy before the Surrogate may effectually prevent the establishment of a will until all its subscribing witnesses (if within the State and competent to testify) shall have been examined.

The examination of any particular person or persons, other than subscribing witnesses, is an essential prerequisite to probate in this court, only when the Surrogate is satisfied that the testimony of such witnesses may be material. When he has declared himself so satisfied, the witnesses who can give such material testimony must be brought before him and examined, unless they are absent from the State or incompetent or unable to testify. No order is necessary for the production of such witnesses. The practical burden of producing them must fall, as I held in *Hoyt v. Jackson* (2 *Dem.*, 450), upon parties proponent, "not because the statute so declares, for it does not, but because as it fails to impose the duty upon parties contestant, they can rest securely upon the fact that until such witnesses have been produced and examined the will cannot be admitted to probate."

It follows that the application of the contestants in the case at bar must be denied.

If the probate proceeding were pending to-day in this court, I could be asked, under § 2618 to determine this question and this only: whether the testimony of the persons whose production as witnesses is here sought may be material; and that question if it

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is now to be passed upon at all, must be passed upon in the court of Common Pleas.

As to the applicability or non-applicability of the provisions of § 2618 to the trial in that tribunal of probate controversies transferred from this I intimate no opinion.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURRO-
GATE.—May, 1887.

MATTER OF MUSGRAVE.

*In the matter of the estate of BENJAMIN S. MUS-
GRAVE, deceased.*

A Surrogate, fixing the penalty of a bond to be exacted from the recipient of ancillary letters, under Code Civ. Pro., § 2699, may, in ascertaining the amount "which appears to be due from the decedent to residents of the State," ignore a disputed claim which is not shown to be probably enforceable.

As to whether Code Civ. Pro., § 829 is applicable to the proofs submitted by an alleged creditor for the purpose of enabling the Surrogate to fix such penalty—*quære*.

MOTION by Arthur Terry, an alleged creditor of decedent to compel Lucy E. Musgrave, to whom ancillary letters testamentary had been issued, under decedent's will, to give an official bond.

E. R. TERRY, *for petitioner*.

B. C. CHETWOOD, *for executrix*.

THE SURROGATE.—In the papers submitted upon this motion, the petitioner's claim to be a creditor of

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the estate is substantiated by no other evidence than his own statements of personal transactions between himself and the decedent. It is insisted that these statements are insufficient to establish, *prima facie*, his claim, and, indeed, that they are altogether incompetent under § 829 of the Code of Civil Procedure. It is urged in opposition that § 829 is not applicable to proceedings like the present. Even if the latter contention is correct, I am inclined to think that the Surrogate, in ascertaining the amount "which appears to be due from the decedent to residents of the State," may properly ignore disputed claims when it is not shown that they are probably enforceable. Now, the claim of this petitioner must ultimately be defeated unless he has other evidence in its support than is here presented. If he can produce other evidence, he may make that fact manifest; otherwise his application must be denied.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—May, 1887.

MATTER OF AYMAR.

*In the matter of the estate of MARY C. B. AYMAR,
deceased.*

The husband of decedent died in her lifetime leaving a will whereby he bequeathed to A. "all interest or dividends" from certain bank stock, gave to decedent "all the rest and residue" of his personal property,

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and appointed her and one, M., its executrix and executor. Decedent took possession of the stock, and held the certificates at the time of her death, which occurred during A.'s lifetime. An application by decedent's representatives for leave to retain the stock, subject to the claims of the life beneficiary, was opposed by M., who set forth that this property afforded the only fund for the future payment of his commissions.—

Held, that decedent must be deemed to have held the stock in her capacity as executrix, and that the same should be surrendered to the surviving representative of her husband's estate.

DETERMINATION of question arising upon judicial settlement of account of personal representatives of decedent.

C. E. TRACY, *for executor and administrator.*

WM. H. RAFTERY, *for W. H. Myer.*

THE SURROGATE.—The representatives of this decedent's estate are John A. Myer, its administrator, *c. t. a.*, and Charles S. Myer, its executor. On January 6th, 1887, they filed with the Surrogate a joint account of their proceedings, which account, save for a single reservation, was judicially settled by a decree entered herein on January 25th, 1887. The question reserved is now submitted for determination. It arises upon the following state of facts.

John J. Aymar, the husband of this decedent, died in her lifetime, leaving a will which contained the following provisions: "I give and bequeath to Eliza E. Babb all interest or dividends from stock standing in my name on the books of the Orange National Bank of Orange, N. J., during her natural life. . . . I give and bequeath to my beloved wife (this testatrix meaning) all the rest and residue of my personal property."

The will designated Mrs. Aymar as its executrix

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and William H. Myer as its executor. Both applied for and received letters testamentary. Mrs. Aymar took into her possession the bank stock aforesaid, paid the dividends thereon as directed by her husband's will, and, at the time of her death, was the holder of the certificates thereof. Miss Aymar's representatives now ask (and Miss Babb, the beneficiary for life of the stock in question approves their application) that they may be permitted to retain the same, subject to the claims of the beneficiary for life. The application is opposed by Mr. William H. Myer, now the sole surviving representative of John J. Aymar's estate. He states in his opposing affidavit that he has never received the executorial commissions to which he is entitled, nor any part thereof, and that the only property of the estate out of which such commissions can be satisfied is the money that may be realized by a sale of the Orange Bank stock after the death of Miss Babb. He claims that the stock in question still forms a part of the assets of John J. Aymar's estate, and that he is himself entitled to the possession of the same, as the sole representative of that estate now living.

This claim seems to me to be well founded. When property has been given by will to one beneficiary for life with remainder to another, under such circumstances as to indicate an intention on the part of the testator that the life tenant should enjoy the thing bequeathed *in specie*, the life tenant has sometimes been permitted to take it into his possession, even without furnishing security to the remainderman (Smith v. Van Ostrand, 64 N. Y., 278; Weeks v.

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Weeks, 5 *N. H.*, 326; Flanagan v. Flanagan, 8 *Abb. N. C.*, 413; Fiske v. Cobb, 6 *Gray*, 144; Taggard v. Piper, 118 *Mass.*, 315). But the surrender to a life tenant of property such as is here the subject of consideration, without exaction of security, and without any provision in the will for its non-exaction, would be manifestly improper (Montfort v. Montfort, 24 *Hun*, 120; Eichelberger v. Barnetz, 17 *S. & R.*, 293; Rodgers v. Rodgers, 7 *Watts*, 19; Kinnard v. Kinnard, 5 *Watts*, 108; Tyson v. Blake, 22 *N. Y.*, 558; Livingston v. Murray, 68 *id.*, 485, 492).

I find no authority whatever in support of the claim that where a testator has bequeathed personal property to A., for life, with remainder to B., the latter in his capacity of remainderman can claim possession of such property in the lifetime of A. Mrs. Aymar must be deemed to have held the bonds with which we are here concerned in her capacity of executrix, and, now that she has died, they should be placed in the hands of the present representative of her husband's estate.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—May, 1887.

MATTER OF HOYT.

In the matter of the estate of JESSE HOYT, deceased.

A Surrogate's court has no power to order a substitution of one attorney for another, in respect of a party to a special proceeding, instituted therein, after the same has been removed by appeal to another court.

Where the daughter and sole next of kin of a decedent, her father, while engaged in contesting his will, which constituted her a *cestui que trust* with an interest less than would belong to her in case the will were refused probate, made application to the court for an allowance, *pendente lite*, out of the income of the estate for her support; which was opposed by her attorney, insisting upon the protection of his lien for services rendered in the cause,—

Held, that such lien, if any existed, could attach only to the excess of contestant's interest in case intestacy were decreed, over that passing to her under the will if sustained, and so furnished no reason for refusing to grant the application to an extent not exceeding the amount of the latter interest.

Under 1 R. S., 730, § 63, enacting that "no person beneficially interested in a trust for the receipt of the rents and profits of lands can assign or in any manner dispose of such interest," extended by the decisions to a trust of personalty,—an attorney for a beneficiary of such a trust, created by will, employed to contest the probate thereof, cannot, by virtue of his retainer, secure, pending the contest, a lien upon income, the disposition of which, for the contestant's benefit, the Surrogate has power to direct.

As to whether an attorney for a party to a special proceeding in a Surrogate's court is entitled to the benefits of the provision of Code Civ. Pro., § 66, declaring that, "from the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim," etc.,—*quære*.

DETERMINATION of contest as to attorney's lien for services, upon share of next of kin of decedent and

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beneficiary under his will; and of an application by the latter for an allowance out of the estate.

ROBERT SEWELL, *for the application.*

F. J. DUPIGNAC, *opposed.*

THE SURROGATE.—On October 3rd, 1882, Mary Irene Hoyt, the daughter of this decedent and his only next of kin, commenced in this court a proceeding for the revocation of the probate of an instrument that had been theretofore adjudged and decreed to be her father's last will and testament.

Aaron Kahn, Esq., appeared as her attorney in such proceeding, and continued to act in that capacity with her approval and by her direction until March 20th, 1885, when she advised him that she would no longer require his services. Shortly thereafter, and while this probate controversy was still pending and undetermined, Miss Hoyt applied to the Surrogate, by F. J. Dupignac, Esq., as her attorney, for an order directing the executors of this estate to pay her the sum of eighty thousand dollars, to be charged against her as beneficiary under her father's alleged will, or as his next of kin, accordingly as the probate of such alleged will should be upheld or overturned.

Mr. Kahn claimed the right to appear in opposition to this application, upon the ground that, as the contestant's attorney of record, he had a lien upon her interest in the estate, and he protested that no moneys should be paid to her thereout, pursuant to the motion of any attorney other than himself, until

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such attorney had been regularly substituted in his stead, either upon his (Mr. Kahn's) consent, or upon payment to him of such sum as, after proper inquiry, might be found to be his due.

The questions involved in this claim have never been determined by the Surrogate. A course was agreed upon and adopted by counsel for the contestant and for Mr. Kahn respectively, which made it unnecessary to decide whether the latter's claim of lien was or was not well founded, or to what, if well founded, it attached, or whether the fact that Mr. Kahn was still the attorney of record for the contestant in the revocation proceeding did or did not preclude her from presenting, through another attorney, an application for an allowance out of this estate. An order of reference was entered, by consent of counsel, under the following circumstances: In the course of a discussion in open court as to the possible delay that might be occasioned in the trial of the probate controversy by Mr. Kahn's opposition to the motion for the \$80,000, Mr. Fullerton, who was then acting as one of the contestant's counsel, stated that if Mr. Kahn would waive service of papers he would then and there move for an order substituting Mr. Dupignac in his (Mr. Kahn's) place as contestant's attorney, upon such terms as might be found just and reasonable after an investigation before a referee. To this proposition Mr. Kahn, through his counsel, acceded.

It was then suggested that as Mr. Kahn might, by an out and out substitution pending a reference, lose the benefit of whatever lien he might have obtained

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upon his client's cause of action and upon any decree that might be made in her favor in the probate proceeding, his rights should be protected by continuing him as one of her attorneys; this with the understanding that Mr. Dupignac's attorneyship should also be recognized, and that Mr. Kahn should not thereafter interfere in the direction or control of the cause. An order was thereupon entered whereby the referee therein designated was directed to take evidence as to "the value of the services rendered by the said Kahn for the said Mary Irene Hoyt, and the moneys he has received from her during the period of such services, and the sums he has properly disbursed on her account, and to report the said evidence to this court, together with his opinion thereon, with all convenient speed." The order contained also the provision following: "That in the meantime and until the further decision of this court upon the coming in of the referee's report, Miss Mary Irene Hoyt may appoint another and additional attorney to the said Aaron Kahn, without prejudice, however, to any lien that the said Kahn now has upon all the papers in his possession and the funds in court for his fees (for services) heretofore rendered in the matter."

The foregoing order of reference was entered on April 18th, 1885. On November 1st, 1886, the referee filed his report. A few days later, the Surrogate, on Mr. Kahn's application, granted an order for Miss Hoyt and the executors of this estate to show cause why such report should not be confirmed, and why an order should not be entered directing, among other things, the payment to Mr.

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Kahn of \$15,745.68 (being the amount found by the referee to be still due to him as contestant's attorney) out of any moneys then in the hands of the executors due or owing to the contestant under her father's will, and in case no moneys should be due or owing to her, then out of the first moneys that should come to the hands of the executors applicable to payment of the testamentary provision for her benefit.

The motion for the confirmation of the referee's report was made before the Surrogate on November 29th, 1886. Prior to that date there had occurred the events following:

On August 28th, 1886, the Surrogate had rendered a decision adverse to the contestant's petition for revocation. On October 6th, a decree had been entered confirming the probate of the will. On October 11th, the petitioner had filed notice of appeal to the Supreme court. On November 15th, that appeal had been perfected by a deposit in this court of \$250 in lieu of an undertaking.

Upon the facts above stated I proceed to consider—

1st. Whether the moving party herein has a lien as attorney upon any interest of the contestant in this estate, and, if such lien exists, then to what it attaches or relates; and

2d. Whether the Surrogate now has authority to direct that the sum found by the referee to be due from the contestant to Mr. Kahn, or any sum whatever, be paid to him by the contestant herself or by the executors and trustees of this estate.

First. Prior to the enactment of the first part of the Code of Civil Procedure, an attorney in an action

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could not claim a lien for his services until he had obtained a verdict, or perhaps, it is safe to say, until the actual entry of a judgment in his client's favor.

The recognized basis of that lien was the right of the attorney to resort to the fruits of a judgment in compensation for his services in obtaining it. In *Baker v. St. Quentin* (12 *M. & W.*, 441-451), Baron PARKE described the charging lien of an attorney as "merely a claim to the equitable interference of the court to have the judgment held as security for his debt." Lord COCKBURN pronounced it in *Mercer v. Graves* (*Law Rep.*, 7 *Q. B.*, 499, 503), as "a claim or right to ask for the intervention of the court for his (the attorney's) protection, when, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs."

The lien of an attorney upon a judgment recovered in the courts of this State was formerly limited to his taxable costs, but by the Code of 1848 an attorney's compensation was made to depend upon the contract, express or implied, between himself and his client, and his charging lien has since been held to cover his entire compensation for services in the action; which compensation, in the absence of a definite agreement as to its amount, has been measured by the reasonable value of such services. It is only, however, since section 66 of the Code of Civil Procedure was amended by chapter 542 of the Laws of 1879, that the lien of an attorney in a judicial proceeding has extended to the "cause of action," and has attached itself to such cause of action from the commencement of such proceeding. Theretofore the fact that an attorney had

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commenced a suit upon a retainer to prosecute it gave him no lien upon what might be recovered in the event of its successful prosecution (Rooney v. Second Ave. R. R. Co., 18 *N. Y.*, 368; Shank v. Shoemaker, 18 *N. Y.*, 489; Pulver v. Harris, 52 *N. Y.*, 73; Wright v. Wright, 70 *N. Y.*, 96; Coughlin v. *N. Y. C. etc., Co.*, 71 *N. Y.*, 443).

The cases just cited hold that, until the entry of judgment, a party might formerly have effected a settlement or compromise with the opposing party without consulting his attorney, and that such settlement or compromise the attorney would ordinarily have been powerless to prevent.

This doctrine was subject to the limitation that any settlement so effected by the parties to an action, in fraud of an attorney conducting it, and with an intention of depriving him of his compensation, would be set aside, so as to allow him to proceed for the collection of his costs (Coughlin v. *N. Y. C., etc., Co.*, *supra*; Talcott v. Bronson, 4 *Paige*, 501; Ackerman v. Ackerman, 14 *Abb. Pr.*, 229; Tullis v. Bushnell, 65 *How. Pr.*, 456).

The character and extent of an attorney's lien are now defined by § 66 of the Code, as follows:

“From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor, and upon the proceeds thereof, in whosoever hands they may come, and cannot be affected by any

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settlement between the parties before or after judgment."

Surrogate COFFIN lately held in *Smith v. Central Trust Co.* (4 *Dem.*, 75), that attorneys conducting special proceedings in Surrogates' courts, are not entitled to the benefits of this section. In an earlier case (*Eisner v. Avery*, 2 *Dem.*, 466), I intimated a contrary opinion, to which I shall, though somewhat hesitatingly, adhere for the purposes of this motion.

Now, what is the "cause of action" to which the lien of the moving party herein must be deemed to relate? Dr. Pomeroy, in his work on "Remedies and Remedial Rights" (§ 454), thus defines that expression: "Every action is brought in order to obtain some particular result which we term the remedy, and which, when granted, is summed up or embodied in the judgment of the court. . . . Every remedial right arises out of an antecedent primary right and corresponding duty, and a delict or breach of such primary right and duty by the person on whom the duty rests. Every judicial action must therefore involve the following elements: A primary right possessed by the plaintiff and a corresponding duty devolving upon the defendant; a delict or wrong done by the defendant, which consists in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict. Every action must contain these essential elements. Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term. . . . The cause of action will there-

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fore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong."

Now, applying this definition, which is stamped with the approval of the Court of Appeals in *Veeder v. Baker* (83 *N. Y.*, 153, 160), to the case at bar, what is here the "cause of action"? If the contestant's claim is well founded, her primary right, growing out of her father's intestacy, is to receive the share of his estate to which, under the Statute of Distributions, she is entitled as his only next of kin. The correlative duty of the persons holding that estate in the pretended capacity of executors and trustees under a pretended will, is to surrender to the contestant such portion thereof as is her due. The wrong which they are perpetrating consists in their undertaking to deprive her of the excess of the benefits that must accrue to her if the will is invalid and ineffectual, above the benefits which they admit belong to her if that instrument is sustained. The obtaining of that excess is the remedial right which she is here seeking to secure.

If the decision and decree of the Surrogate shall ultimately be sustained on appeal, it will be discovered that the contestant has never had any just "cause of action" at all, and that she has therefore never had any interest in this estate to which the lien of her attorney can at any time have attached. If Mr. Kahn's lien is limited, therefore, to the surplus of what is his client's due in case her father is discovered to have died intestate, above the sum to which she may justly lay claim in case the probate of his alleged will

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shall be justified, it follows that, in passing upon her applications for advances, her indebtedness to Mr. Kahn is not to be taken into consideration; for the Surrogate has never hitherto directed, and, pending the appeal from his decree of October 6th, 1886, can never hereafter direct, the payment of any advance to the contestant in excess of the sum to which she would be entitled as *cestui que trust* under the will. See my memoranda of January 13th, 1883, July 23d, 1883, and July 15th, 1886, of which the first named is reported *sub nom.* Hoyt v. Jackson (1 *Dem.*, 553).

The lien of the moving party upon his client's cause of action has been in nowise impaired, therefore, by the payment to her of moneys to which the lien could in no contingency attach, and that lien can be in nowise impaired by like payments hereafter.

Unless he shall receive such balance of compensation as may be owing to him, Mr. Kahn's lien upon such cause of action must continue in force until it shall be perfected by a judgment in his client's favor, in the court to which resort shall finally be had, or until, in that tribunal, a judgment shall be recovered against her, by which it shall be finally determined that she has never had any just cause of action, and that there is, therefore, no foundation for any lien.

Second. There is another consideration which also impels me to the conclusion that the moving party herein has no lien as attorney upon the interest of his client as beneficiary of the trust created by the will for her benefit.

Section 63, tit. 2, ch. 1, part 2, of the Revised Statutes (3 Banks 7th ed., 2182), provides that "no per-

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son beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest." This constraint has been declared by numerous decisions to be applicable to persons beneficially interested in trusts for the payment of income of personal property, as well as to persons so interested in the rents and profits of realty (*Hallet v. Thompson*, 5 *Paige*, 583; *Clute v. Bool*, 8 *Paige*, 83; *Bramhall v. Ferris*, 14 *N. Y.*, 41; *Graff v. Bonnett*, 31 *N. Y.*, 9; *Campbell v. Foster*, 35 *N. Y.*, 361; *Genet v. Foster*, 18 *How. Pr.*, 50; *Manning v. Evans*, 19 *Hun*, 500, 502; *Cutting v. Cutting*, 85 *N. Y.*, 522, 546; *Lent v. Howard*, 89 *N. Y.*, 169, 181; *Cook v. Lowry*, 95 *N. Y.*, 103, 111; *Tolles v. Wood*, 99 *N. Y.*, 616).

The beneficiary of a trust for the receipt of income is unable therefore to assign, dispose of, or in any manner mortgage or pledge his interest in such income, or to contract any debt which can create a lien upon it. A person to whom he is indebted may, in a court of general equity jurisdiction, and not elsewhere, and in a proceeding where an issue is directly made as to the amount necessary for the debtor's support, and not otherwise, reach any trust income belonging to the debtor, in excess of the sums necessary for the education, support and maintenance of himself and family, and can reach naught besides (1836, *Hallet v. Thompson*, *supra*; 1840, *Clute v. Bool*, *supra*; 1845, *L'Amoureux v. Van Rensselaer*, 1 *Barb. Ch.*, 34; 1846, *Rider v. Mason*, 4 *Sandf. Ch.*, 351; 1847, *Silleck v. Mason*, 2 *Barb. Ch.*, 79; 1849, *Stewart v. McMartin*, 5 *Barb.*, 438; 1856, *Bramhall*

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v. Ferris, *supra*; 1857, Scott v. Nevius, 6 *Duer*, 672; 1859, Genet v. Foster, *supra*; 1865, Genet v. Beekman, 45 *Barb.*, 382; 1865, Graff v. Bonnett, *supra*; 1866, Moulton v. De Macarty, 6 *Robt.*, 533; 1866, Locke v. Mabbett, 2 *Keyes*, 457; 1866, Campbell v. Foster, *supra*; 1877, Williams v. Thorn, 70 *N. Y.*, 280; 1880, Manning v. Evans, *supra*; 1885, Tolles v. Wood, *supra*).

The Court of Appeals, in the case last cited, says: "The disposition of such an income" (*i. e.*, of income directed by a testator to be applied by his trustees to the use of a beneficiary) "cannot be anticipated by the *cestui que trust* or encumbered by any contract entered into by him providing for its pledge, transfer or alienation previous to its accumulation." And the court says further, that "the creditor of such a beneficiary acquires a lien upon the accrued or unexpended surplus income, or that subsequently arising from such fund, superior to the claims of general creditors or assignees of the *cestui que trust*, by the commencement of an action in equity to reach and appropriate it to the satisfaction of his judgment."

Now the testator in the case at bar has directed his trustees to collect the income of the trust in behalf of his daughter, and to apply the same "as the same may be required for her use and benefit, for and during her natural life, in the most bounteous and liberal manner as to expenditure, and so as to promote her convenience and comfort." Whether the beneficiary can claim under this provision the entire income of the trust, or whether the trustees can withhold such portion as may not in their discretion be found requi-

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site for her "convenience and comfort" and her "bounteous and liberal support," and what disposition must be made of any surplus income that the trust fund may yield in excess of the sums that may from time to time be applied to her use by the trustees, cannot be here and now determined. It may perhaps be doubtful whether under this testator's will a creditor of his daughter can ever lay hold of any surplus income of the trust for her benefit, and it is clear that while the validity and integrity of that will are still in dispute, the sums whose disposition for the contestant's benefit the Surrogate can direct, are precisely those sums which she "cannot encumber by any contract providing for its pledge, transfer or alienation," and upon which therefore no attorney can upon her retainer have secured a lien (*Noyes v. Blakeman*, 3 *Sandf.*, 531, 541; *aff'd*, 6 *N. Y.*, 567, 579, 583; *Embree v. Franklin*, 23 *Hun*, 203; *Twopenny v. Peyton*, 10 *Sim.*, 487; *Holmes v. Penney*, 3 *K. & J.*, 90; *Hall v. Williams*, 120 *Mass.*, 344).

An order may be entered directing the executors and trustees of this estate to pay the contestant the sum of \$12,000.

Third. There remains to be considered the question whether, apart from any supposed authority to direct the application of funds of this estate to the satisfaction of an attorney's lien, the Surrogate can now declare the amount of the moving party's claim against the contestant and give direction for its satisfaction.

It is manifest that the Surrogate has no jurisdiction in the premises, except such as springs from his

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authority to prescribe the terms upon which he will direct the substitution of an attorney for the contestant in place of the attorney who instituted her proceedings for revocation of probate. Counsel for Mr. Kahn asks that Mr. Dupignac be displaced as "additional attorney," unless the moneys found by the referee to be due his client shall be paid, and asks that, in the event of its payment, Mr. Dupignac be substituted for his client and the latter discharged from the contestant's service.

No such direction can now be given, for the reason that the proceeding out of which this controversy has sprung is no longer pending. Whatever power the Surrogate may formerly have had to direct the conditions upon which a substitution of attorneys should be effected, no such power exists to-day.

It has been already stated that, before the submission of the motion to confirm the report of the referee, the probate controversy had been removed out of this court into the Supreme court by appeal.

An order substituting one attorney for another is merely an incident in the progress of a cause, and no such order can be made by a court in which no cause is pending to which such order can relate. When the question as to the substitution of attorneys first arose and the reference here in question was ordered, it was doubtless supposed by all parties that it could be speedily terminated, and that, during the pendency of the proceeding for probate, the referee's report would be submitted to the Surrogate for his consideration and action. That expectation has not been realized. The moving party herein must there-

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fore seek in some other tribunal the relief to which he may deem himself entitled.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—May, 1887.

MATTER OF MAPES.

In the matter of the estate of DANIEL MAPES, deceased.

An administrator who kept \$29,000 on deposit, for a year after his administration of decedent's estate was substantially completed, was—
Held, liable for interest thereon, at the rate of one and one half per cent., from the expiration of a year after the date of his appointment.

HEARING of exceptions to report of referee to whom were referred the account, and objections thereto, of the administrator of decedent's estate, in proceedings for judicial settlement.

BAKER & RISLEY, *for administrator.*

SAMUEL M. PURDY, JAMES C. DELAMARE, *and* JAMES R. JESUP, *for other parties.*

THE SURROGATE.—I think that this accounting party is justly chargeable with the sum of \$528.07, being interest at one and one half per cent. per annum, on the moneys of the estate that he has suffered to lie idle since March 16th, 1885, the expiration of a year from his appointment as administrator. The referee holds him accountable in the further sum of

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\$84.41, as interest on former balances in his hands. This finding is not approved, but in all other respects the referee's report is confirmed.

It is true, as counsel for the administrator claims, that courts are more reluctant to charge executors and administrators than to charge trustees for suffering funds committed to them to remain unproductive. But in the present case the executor kept on deposit for a whole year after the administration had been substantially wound up, the considerable sum of \$29,000, upon which he might easily have secured interest from a trust company for the benefit of the estate. He must pay the penalty of this remissness (*Harrington v. Libby*, 6 *Daly*, 259, 267; *Dunscomb v. Dunscomb*, 1 *Johns. Ch.*, 508, 511; *Livermore v. Wortman*, 25 *Hun*, 341; *Hockley v. Wilcocks*, 1 *Binney*, 194; *Brandon v. Hoggatt*, 32 *Miss.*, 335; *Ogilvie v. Ogilvie*, 1 *Bradf.*, 356; *Shuttleworth v. Winter*, 55 *N. Y.*, 63).

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—May, 1887.

MATTER OF BATTLE.

*In the matter of the estate of ANTHONY BATTLE,
deceased.*

An application to a Surrogate's court, to imprison for contempt a party shown to have disobeyed its decree, made pursuant to Code Civ. Pro., § 2555, providing that a decree "may be enforced," in the cases there-

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in specified, by punishing the delinquent for a contempt, is addressed to the discretion of the court.

Notwithstanding the declaration of Code Civ. Pro., § 2552, that a decree directing payment of money by an executor is conclusive evidence of the possession of assets sufficient to satisfy the sum specified, the court may by virtue of the authority implied in id., § 2286, which permits the discharge from imprisonment of one unable to perform the act or duty required, refuse to punish an executor for disobeying such a decree where it is shown that, in truth and fact, he has been, at all times since the entry thereof, utterly unable to comply with its directions.

ORDER to show cause why administratrix should not be punished for contempt in disobeying decree directing the payment of money.

BOORAEM & HAMILTON, *for the application.*

B. D. PENFIELD, *for administratrix.*

THE SURROGATE.—This respondent, Mary Battle, is the widow of the decedent and the administratrix of his estate. As such administratrix she filed an account in September, 1885, which was judicially settled by a decree of this court entered in July, 1886. By that decree she was ordered to make certain payments out of a balance of estate funds adjudged to be in her hands. This order she has not obeyed, and in behalf of six persons claiming to be aggrieved, to whom she was directed to pay in the aggregate the sum of \$169.89, the Surrogate is asked to imprison her for contempt.

Affidavits have been filed by her counsel alleging that she is of the age of 55 years; that she is without means, and is largely dependent upon charity; that since the death of her husband in November, 1883, she has been almost totally blind; that before the entry of the decree of July, 1886, she had expended the small estate left by the decedent; that she was

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driven to this course by dire want, and only pursued it upon promise of her brother—a promise which he has not fulfilled and has been unable to fulfil—that he would restore to her such sums as she might be compelled to use for her support.

The proceeding is brought under § 2555 of the Code of Civil Procedure. That section declares that a decree of a Surrogate's court "*may*" be enforced in the manner therein prescribed. The legislature has made use of this word "*may*" in providing by § 1241 for the enforcement of judgments.

It was held by our court of last resort upon appeal from the Supreme court in the Second Department in *Cochran v. Ingersoll* (72 *N. Y.*, 613) that an application under § 1241 to punish for contempt a person who had wilfully neglected or refused to comply with the direction of a judgment, was addressed to the discretion of the court in which such judgment had been recovered.

The Supreme court, at Special Term, having refused, in the case just cited, to enforce its judgment by imprisoning the judgment debtor, its action was sustained on appeal. DYKMAN, J., pronouncing the General Term opinion (13 *Hun*, 368), referred to the provisions of § 20, tit. 13, ch. 8, part 3, R. S. (3 Banks, 6th ed., 841)—to the effect that a court which had directed the imprisonment for contempt of one who had failed to comply with its judgment might relieve the delinquent upon ascertaining that compliance was impossible—and approved Surrogate BRADFORD's suggestion in *Doran v. Dempsey* (1 *Bradf.*, 490), that a state of facts which, pending one's imprisonment in

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contempt proceedings, would justify his unqualified discharge, would equally have justified the denial of an application for his commitment, if it had been brought, at the presentation of such application, to the attention of the court.

This doctrine was reiterated in *Parke v. Parke* (18 *Hun*, 466); its correctness was subsequently questioned in *Strobridge v. Strobridge* (21 *Hun*, 288), but seems to have been squarely sustained by the Court of Appeals in *Cochran v. Ingersoll* (73 *N. Y.*, *supra*).

The statute above cited is no longer in force, but its provisions have been substantially re-enacted in § 2286 of the Code of Civil Procedure. It seems to me, therefore, that when the Surrogate is asked to imprison for contempt one who is shown to have disobeyed a decree of his court, he is not bound to grant the application as of course, but should grant or deny it in his sound discretion. This discretion should never be exercised in favor of a delinquent executor or administrator, who has been directed to make payments from money previously adjudged to be in his hands, and who has disobeyed such direction, except under extraordinary circumstances. His mere inability to obey such direction at the time it is sought to enforce it should not suffice of itself to shield him from commitment—especially in cases where that inability has been occasioned by his dishonesty or his wilful misappropriation of the funds committed to his hands (*Matter of Synder*, 34 *Hun*, 302; *aff'd*, 103 *N. Y.*, 178).

There is, indeed, an intimation in the opinion of DANFORTH, J., in the case last cited, that when it has

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been shown to the satisfaction of the Surrogate, in a contempt proceeding, that an executor or administrator who has been adjudged to have in his hands funds of his decedent's estate, has knowingly neglected to obey a decree for a payment out of such funds, the Surrogate may at that stage terminate the investigation and order the commitment of the delinquent.

But Judge DANFORTH subsequently says, after commenting upon the special facts of the case before him: "The Surrogate was not necessarily concluded by these bald and uncorroborated assertions of the defaulting executor, and, as the question is not only one to be determined upon evidence at least conflicting, but also rests in discretion which has not been unfairly exercised, we find no ground on which we can review the Surrogate's decision," citing *Cochran v. Ingersoll* (*supra*).

This language seems to me to be quite inconsistent with the soundness of the claim of counsel for the moving party in the case of bar, that, even for shielding herself from imprisonment for contempt, the respondent cannot, in the face of the decree of July 15th, 1886, and the provisions of § 2552 of the Code of Civil Procedure, be permitted to show that in truth and in fact she has at all times, since such decree was entered, been utterly unable to obey its directions.

If such be the legitimate scope and effect of the language of § 2552 as to what shall constitute "conclusive evidence" of sufficiency of assets, it must follow that when this court has once directed an executor or administrator to be imprisoned for disobeying a decree for the payment of money, this same "con-

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clusive evidence" must render it forever afterwards powerless to grant the offender any relief under § 2286 based upon his actual inability to do what has been required of him.

It was held by the Court of Appeals, in *Baucus v. Stover* (39 *N. Y.*, 1), that although an executor is declared by § 13, tit. 3, ch. 6, part 2, R. S. (3 Banks, 7th ed., 2296), to be liable for his indebtedness to his testator "as for so much money in his hands at the time such debt becomes due" if nevertheless "he should be wholly unable to pay the money, in pursuance of the order or decree of the Surrogate, on account of his insolvency, he could not be attached and punished for contempt." An interpretation of § 2552, which would save this respondent from imprisonment (assuming that the statements in exoneration of her conduct are true) is in line with the interpretation of § 13, which has the sanction of our highest court, in *Baucus v. Stover*.

I feel warranted by the authorities above cited in applying to the case at bar the test which Judge DYKMAN applied in *Cochran v. Ingersoll*, viz.: If this respondent were actually in confinement to-day for disobedience to the decree here sought to be enforced, and were now asking to be discharged because of her inability to obey its directions, would her application commend itself to the approval of the court?

I think that it would and should, upon the papers before me, and must therefore dismiss the present proceeding, unless the moving party wishes to submit affidavits in opposition to those presented by the

MATTER OF COWDREY.

respondent, or to pursue before the Surrogate an inquiry into the truth of the allegations in her behalf.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—May, 1887.

MATTER OF COWDREY.

In the matter of the estate of NATHANIEL C. COWDREY, deceased.

A petition presented, under Code Civ. Pro., § 2717, by an alleged creditor of a decedent, praying for an accounting by the executor, and the payment of petitioner's claim, may, where eighteen months have expired since the issuance of letters testamentary, be granted so far as to require an accounting, though subject to dismissal as to the payment by reason of a dispute with respect to the validity of the demand.

In a special proceeding instituted, under Code Civ. Pro., § 2717, for the payment of a creditor's claim, a dispute as to whether the same has been admitted by the executor or administrator, is a dispute about its validity and legality, and necessitates a dismissal of the petition under id., § 2718.

PETITION by Agnes E. Tracy, an alleged creditor of decedent, for a decree directing payment of her claim.

SEWARD, DA COSTA & GUTHRIE, *for petitioner.*

ARTHUR C. BUTTS, *for executrix.*

THE SURROGATE.—The petitioner alleges herself to be a creditor of this testator, and asks for an order directing his executrix to render an account and to pay her claim against this estate, amounting, with in-

terest, to over \$10,000. She avers in her petition that she caused this claim to be presented to the executrix for payment on December 2d, 1885, and that the executrix did not dispute the same, but, on the contrary, admitted it. The respondent protests, by a duly verified answer, that she made no such admission, insists that the claim is invalid and illegal, and makes certain statements under oath which show that its validity and legality are doubtful.

Does the interposition of this answer necessitate the dismissal of the petition so far as the petition asks for the payment of money?

If it were conceded that the respondent had heretofore formally admitted the claim which she now assails, or if such an admission were established by uncontroverted evidence, I should be justified in holding that such claim is no longer open to dispute (*Lambert v. Craft*, 98 *N. Y.*, 342). It was held in that case that where an executor or administrator admits a claim, or fails to reject it after its presentation and after reasonable opportunity for examination as to its validity and fairness, it acquires the character of a liquidated and undisputed indebtedness against his decedent's estate. This decision strictly relates to such claims only as are presented pending the publication of notice to creditors or after such publication has ceased; and the court, referring to the burden imposed by the short Statute of Limitations upon a decedent's creditors, declares that the scheme for the speedy settlement of estates of deceased persons would be imperfect if it did not secure to the creditor some corresponding advantage.

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But while the case at bar differs from that of *Lambert v. Craft*, in the fact that the occasion of the presentation of the claim here in controversy and the various occasions when it is alleged to have been admitted by this respondent, were all prior to the entry of the order for publication of notice to creditors, I do not regard this difference as important; for § 1822 of the Code, which declares the circumstances under which the "short statute" may be put in operation was amended in 1882 (L. 1882, ch. 399), and in all cases where a publication is had, that statute now runs against claims presented *before* such publication as well against claims presented *subsequently*. So far, therefore, as the decision in *Lambert v. Craft* is based upon the reciprocal rights and duties of a decedent's creditors and the representative of his estate, it is fully applicable to the present situation.

But it is not decisive of this case, for the reason that the respondent herein has confronted the petitioner's claim with a verified answer which serves to oust the Surrogate of jurisdiction. A dispute as to whether that claim has or has not been admitted is a dispute about its validity and legality, and the petition for its payment must therefore be dismissed (*Hurlburt v. Durant*, 88 *N. Y.* 121).

Eighteen months have now elapsed since the respondent obtained letters testamentary. She must be directed to account.

The fact that the petitioner's claim is in dispute is no ground for denying her application for an accounting (*Schmidt v. Heusner*, 4 *Dem.*, 275).

MATTER OF CUTTING.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—May, 1887.

MATTER OF CUTTING.

In the matter of the estate of GERTRUDE CUTTING, deceased.

One otherwise entitled to letters of administration will not be rejected under 2 R. S., 75, § 32, on the ground of improvidence, unless it is shown that he is so destitute of care and foresight in the management of property that the estate and effects of the decedent would be likely to be unsafe and liable to be lost and diminished, in case administration thereof were committed to him.

Coope v. Lowerre, 1 Barb. Ch., 45—approved and followed.

APPLICATION for letters of administration with the will of decedent annexed.

HAND, BONNEY, PELL & JONES, *for petitioner.*

ROOT & CADWALLADER, *for objectors.*

THE SURROGATE.—By virtue of § 2643 of the Code of Civil Procedure, this petitioner is entitled to letters of administration, *c. t. a.*, upon the estate of the testatrix unless within the meaning of that section he is a person not “qualified to act.” To ascertain whether he labors under any disqualification, reference must be had to § 32, tit. 2, ch. 6, part 2, of the R. S. (3 Banks, 7th ed., 2291).

That section provides that “no letters of administration shall be granted to any person who shall be judged incompetent by the Surrogate to execute the duties of such trust by *reason of improvidence.*” It specifies other grounds for the refusal of letters, but

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no others which have any application to the case at bar. This section 32 was in operation at the time of the decision of *Coope v. Lowerre* (1 *Barb. Ch.*, 45), and has ever since remained upon the statute book.

In that case, it was held by Chancellor WALWORTH that the Surrogate had no discretionary power to refuse letters to an applicant preferentially entitled thereto under the statute fixing rights of priority, except from one of the causes specified in § 32, *supra*. The Chancellor also said: "The improvidence which the framers of the Revised Statutes had in contemplation as a ground of exclusion is that want of care or foresight in the management of property which would be likely to render the estate and effects of the decedent unsafe and liable to be lost or diminished, in case administration thereof should be committed to such improvident person."

The soundness of this decision seems never to have been questioned, and the case in which it was rendered has been often referred to with approval (*Coggeshall v. Green*, 9 *Hun*, 471; *McMahon v. Harrison*, 6 *N. Y.*, 448; *Emerson v. Bowers*, 14 *N. Y.*, 445). In view of the cases just cited and of the cases following, I cannot find that this petitioner is "improvident." The objections to his qualifying as administrator, *c. t. a.*, are therefore overruled (*O'Brien v. Neubert*, 3 *Dem.*, 156; *Blanck v. Morrison*, 4 *id.*, 297; *McGregor v. McGregor*, 1 *Keyes*, 133; *Hayward v. Place*, 4 *Dem.*, 487; *aff'd* in Supreme Ct. and in Ct. of Appeals).

MATTER OF BERRY.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—May, 1887.

MATTER OF BERRY.

In the matter of the estate of CHARLES W. BERRY, deceased.

Executors to whom their testator has given his estate in trust to apply the income to the use of an infant daughter for life, with authority "in their discretion to apply, if necessary for her support, such part of the principal as they may think necessary," etc., will be directed by the court to make suitable payments out of the principal, where it appears that they have not honestly and in good faith exercised the power with which they were clothed.

APPLICATION by William C. Banning, as testamentary guardian of Helen M. Berry, an infant, to compel payment of principal of trust fund for support of ward.

GEO. HILL, *for petitioner.*

FREDERICK P. FORSTER, *opposed.*

THE SURROGATE.—The will of this decedent gives his entire estate to his executors in trust to apply the income to the use of his daughter during her life, and with authority "in their discretion to apply, if necessary for her support, such part of the principal as they may think necessary, but not exceeding \$500 in any one year."

The *cestui que trust* is an infant about five years of age. Her testamentary guardian seeks by the present proceeding to obtain an order directing the executors to advance him, for the ward's necessary support,

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some portion of the principal of this estate. The petitioner shows that for the three years and eight months last past, he has supported and maintained the infant, and that during that period the total amount paid to him from all sources for her benefit is \$614.90. Of this, \$427.40 was received from these respondents.

The executors allege in their answer that they have "*deemed it wise and for the best interests of said minor that the principal of the estate should be saved until she shall attain her majority, and it is for that reason that they have declined to apply the principal of the estate towards her support.*"

Apart from the interest in the funds in the hands of these respondents, the infant's estate consists solely of her right to the income of \$6,606.25 bequeathed to her by the will of her grandfather. There can be no reasonable doubt that the sums which the respondents have seen fit to apply to the support of this child have been in fact altogether inadequate to its necessities, and it seems to me that they have not honestly and in good faith exercised the discretion with which they are clothed by the testator's will. They substantially assert in their answer that, in refusing to encroach upon the principal of this estate for the child's maintenance, they are governed by a consideration of what will be for her best interests sixteen years hence. The matter upon which they are especially bound to exercise their discretion is the ascertainment of what portion, if any, of the principal fund in their hands is *now* needed

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for the child's support in the care of the testamentary guardian to whom its father has confided it.

The fact that one of these executors and the wife of the other will be entitled, in case this infant shall die without issue, to so much of the principal as shall remain unexpended in the executors' hands, and the fact that during the five months in which the infant was in charge of the executor, Gunn, he and his associate saw fit to deplete the principal of the estate at a rate much in excess of the rate of \$500 per annum, tend to support the petitioner's contention that the respondents here used their authority in disregard of the facts and circumstances which belong to the proper exercise of the discretion vested in them by the testator's will.

It seems clear to me, upon the whole case, that some portion of the principal should be applied to the infant's support, and if the respondents and the guardian cannot agree upon the amount necessary for that purpose, I must direct a reference.

Counsel for the respondent insists that this court has no jurisdiction to grant the order here prayed for. The limits of the Surrogate's authority in the premises were set forth in *Banning v. Gunn* (4 *Dem.*, 337). The doctrine of that case is left quite undisturbed by the recent decision of the Court of Appeals in *Lawrence v. Cooke* (11 *N. E. Rep.*, 144).

MATTER OF BULL.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—June, 1887.

MATTER OF BULL.

*In the matter of the estate of CECILIA M. BULL,
deceased.*

Testatrix, by the first clause of her will, directed that her funeral charges, expenses of administration and debts be paid out of a specified fund of \$18,000; by the second, bequeathed to her husband \$6,000, to be paid to him out of that fund; and then gave "the balance or remainder of said sum or fund of \$18,000" to her children. Upon the settlement of the executor's account, it was objected, in behalf of the children, that all the burdens had been charged upon their interest in the fund, to the exoneration of that of the decedent's husband.—

Held, that the children were entitled only to what was left of the sum or fund in question, after satisfaction of the charges specified and the bequest to their father.

HEARING of objections, interposed by legatee, to account of executor of decedent's will, in proceedings for judicial settlement.

RUSSELL, DENNISON & LATTING, *for executor.*

MILLER, PECKHAM & DICKSON, J. W. E. YORK, A. W. SPEIR, and
MACLAY & FORREST, *for other parties.*

THE SURROGATE.—To the account lately filed by the respondent herein, as executor of the estate of Cecilia M. Bull, deceased, two objections were interposed by Julia J. Bull, a daughter of the testatrix, and a legatee under the will. Those objections alleged

(1) That, although that will refers to a certain sum of \$18,000, as constituting a fund belonging to Mrs. Bull in the hands of her brother, John DeRuyter, the

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executor had accounted for "only a portion of said sum," and

(2) That no statement had been made as to the amount properly chargeable by way of interest on the fund in question, and that no sufficient information had been given as to the manner in which said fund had been invested. Both these objections were withdrawn after they had elicited from the executor a supplementary account, which was filed by him on the 11th of March last.

Counsel for the contestant now asks that she be allowed to file new objections to the account. While he gives no explanation of his failure to submit those objections within the time limited by the rules of this court, I might, despite the delay, allow their interposition if it were not so evident to my mind that they are without substantial merit.

They are based upon the theory that the executor has erroneously treated the costs of his administration and the debts and funeral expenses of his testatrix, as chargeable upon the interest of her children in the \$18,000 fund, to the exoneration of the interest of her husband therein. "I direct," says the first clause of the will, "that my funeral charges, the expense of administering my estate, and my lawful debts be paid out of the sum or fund of \$18,000, now in the hands of my brother, John DeRuyter."

By its second clause, the will gives to the husband of the testatrix, "the sum of \$6,000 to be paid to him out of the said sum of \$18,000"; it gives him also "my Jersey City bond of \$1,000, together with my household furniture, jewelry, etc." Then comes the

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following provision: "I give and bequeath unto my children" (naming them) "*the balance or remainder* of said sum or fund \$18,000 aforementioned, equally between them, share and share alike." By clause four, the testatrix gives certain specific legacies to these children, and by clause five she gives "the residue and remainder if any" to her husband.

The executor has paid in full Mr. Bull's legacy of \$6,000, and has transferred to him all the property specifically bequeathed him by the will. In thus throwing upon the contestant and her brother and sisters the burden of the debts and funeral and administration expenses, the executor has but obeyed the express requirements of the will. Those disbursements are a first charge upon the \$18,000 fund; from the surplus of that fund the husband of the testatrix is next entitled to the sum of \$6,000, even though in the satisfaction of his claims the fund should be entirely exhausted. The children must content themselves with the balance or remainder of such sum or fund, after the satisfaction of the charges above specified and of the bequest to their father (*Choat v. Yeats*, 1 *Jac. & W.*, 102; *Browne v. Groombridge*, 4 *Madd.*, 495; *Vernon v. Earl Manvers*, 31 *Beav.*, 623; *Webb v. De Beauvoisin*, 31 *Beav.*, 573; *Hewett v. Snare*, 1 *De G. & Sm.*, 333; *Corbet v. Corbet*, 8 *Ir. Rep. Eq.*, 407; *Miles v. Harrison*, 8 *L. R., Ch. App.*, 316; *Penny v. Penny*, 11 *L. R., Ch. Div.*, 440).

Let a decree be entered for the judicial settlement of the executor's account.

MATTER OF VAN NESS.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SUBROGATE.—June, 1887.

MATTER OF VAN NESS.

In the matter of the estate of CHRISTIAN VAN NESS, deceased.

Testator, by his will, directed that, out of the income of his estate, \$140 be annually applied to the maintenance, during life, of his daughter A., a person of unsound mind; gave the remaining income to his wife for life; and further provided that, at the death of his wife, should A. be living, all his estate except the sum set apart for the maintenance of the latter, be divided equally among his children who might then be living, etc., A. survived her mother.—

Held, that A. was entitled to a share of the residue distributable upon the widow's death.

CONSTRUCTION of decedent's will, upon judicial settlement of account of executor thereof.

PHILIP MALONE, *for executor.*

THE SURROGATE.—A decree is about to be entered for the judicial settlement of the account of the executor of this estate. The death of the testator's widow has recently set free for distribution the principal of the residuary estate which has for the past ten years been yielding income for her benefit. The question now arises—who are entitled to share in this distribution.

The first article of the testator's will directed that out of the income of his estate the sum of \$140 be annually applied for the support and maintenance during her natural life of his daughter, Ann, a person of unsound mind.

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Article second gave to his wife, Catherine, for her e, the total income in excess of the amount applied his daughter. Article third is in words following: At the death of my said wife, should my said daughter Ann be still living, I direct that all my estate, of every name and kind whatsoever, except the sum rein set apart for the maintenance of my said daughter Ann, be divided equally among my children so may then be living, and the lawful issue of any deceased child, *per stirpes*."

Ann Van Ness survived her mother and is still living; so also are three other children of the testator, and two grandchildren, children of his deceased son. It is suggested by counsel for the executor, that upon proper interpretation of the provision last above quoted, Ann Van Ness must be excluded from taking any share in this estate, except her interest in the fund set apart for her support. If this was the purpose of the testator, he has signally failed to manifest by his language. He has directed an equal division of the residuary estate among such of his children as should survive his widow—and Ann seems to be as much entitled to a share as any of the others. There is nothing in the terms of article fourth calculated to support the executor's contention. "At the death of my said daughter Ann," says that article, "should her mother at that time have deceased, I direct that the principal of the sum above directed to be set apart for her use be equally divided among my children in precisely the same manner as I have directed in the last preceding article, with no respect to the death of my estate."

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As the distribution for which this article provides cannot take place until Ann's decease, and as it is directed to be made "in precisely the same manner" as the distribution provided for by article three, it is argued that the testator must have contemplated that Ann should receive no portion of the residuary estate to which such last named article relates. This contention seems to me unsound. A very natural and reasonable construction can be given to the phrase "in precisely the same manner," which will make the article of the will in which that phrase appears consistent with the *only* natural and reasonable construction of the phrase "among my children who may then be living," as used in article third.

Decree accordingly.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—June, 1887.

MATTER OF CHARDAVOYNE.

MATTER OF MATTSON.

In the matter of the estate of GEORGE M. CHARDAVOYNE, *deceased.*

In the matter of the estate of MORRIS MATTSON, *deceased.*

The time of *the passage* of an act of the legislature, approved by the executive, is the day when it receives such approval, as certified by the secretary of State.

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As to whether the statute, L. 1885, ch. 483, entitled "an act to tax gifts, legacies and collateral inheritances in certain cases," *commenced and took effect* on the day of its passage, or on the twentieth day thereafter—*quære*.

Words of a statute should not be treated as surplusage, if, upon any fair and reasonable construction, they are found to serve an intelligible purpose.

The opening clause of the first section of the act cited, viz. : "after the passage of this act," is grammatically related to the word "pass" or "die," in that section occurring ; and is operative to subject to taxation property passing, in the manner specified, to one not exempt, from an owner dying after June 10th, 1885.

SUSAN M. JOURNEAY and Joseph B. Lockwood, the administrators of the estate of George M. Chardavoyne, deceased, filed a petition, setting forth that, pursuant to a decree judicially settling their account, they had caused the property of the estate to be appraised at its fair market value, and made distribution among the persons entitled thereto, retaining, however, in their hands, sufficient funds to pay the tax imposed by L. 1885, ch. 483, in case it should be determined that such tax was due and payable ; and praying that the court determine whether or not that act had any application to decedent's estate, and for a citation to the nephews and nieces of decedent, the comptroller of the city, and the district attorney of the county of New York.

HENRY N. TIFT, *for petitioners*.

GRANVILLE P. HAWES, *for next of kin*.

R. B. MARTINE, *district attorney*.

FRANCIS B. COOLEY and Roland Mather, executors of the will of Morris Mattson, deceased, filed a petition, setting forth that an appraisal had been had,

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under the act of 1885 (ch. 483), in respect of their decedent's estate; that a question had arisen as to whether the legacies bequeathed by the will were liable to the tax by that act imposed, and praying for a citation directed to the comptroller and the district attorney of the county of New York, and to a corporation, legatee, to show cause why the tax should not be paid, or the estate relieved therefrom.

KELLY & MACRAE, *for executors.*

EDWARD C. CHRISTIE, *for legatee.*

THE SURROGATE.—At the times of their respective deaths these decedents were residents of the city of New York. The former died intestate on June 13th, 1885, leaving as his surviving next of kin two sisters and several nephews and nieces. The latter left a will, admitted to probate on July 30th, 1885, whereby legacies are bequeathed to divers beneficiaries, including certain persons strangers to his blood. I am now to determine whether any portion of either of these estates is liable to taxation under the act of the legislature of 1885, entitled "An act to tax gifts, legacies and collateral inheritances."

The claim of non-liability rests, as regards both estates alike, upon the contention that that act applies to the estates of such persons, and of such persons only, as have died since June 30th, 1885. Mr. Chardavoyne died on June 13th of that year, and Mattson on the day following. On June 10th, 1885, the bill which now appears as chapter 483 of the statutes of that year, having been duly passed by both Houses of the legislature, was presented to the Governor, and

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was by him approved. The certificate of his approbation was indorsed thereon, and the bill so indorsed was delivered to the Secretary of State, pursuant to art. 4, sec. 9 of the Constitution of this State, and sec. 4, tit. 4, ch. 7, part 1, of the Revised Statutes (1 Banks, 7th ed., 432). It was then, pursuant to § 10 of the same title, deposited in the office of the Secretary of State, who proceeded as directed by § 11, to certify and indorse thereon "June 10th, 1885," as the day, month and year when it "became a law."

It is provided by § 12 that "*every law, unless a different time shall be prescribed therein*, shall commence and take effect on, and not before, the twentieth day after its final passage." It follows, therefore, that unless chapter 483 prescribes some different date than June 30th, 1885, as the date of its commencement and taking effect, it commenced and took effect on that day and not sooner.

The district attorney of this county, who has appeared in these proceedings in accordance with § 17 of the act here in question, contends that the estates of these decedents, which, but for the provisions of that act would have passed by the Statutes of Descent and Distribution to Mr. Chardavoyne's heirs and next of kin, and to Mr. Mattson's legatees and devisees, are liable to the tax by that act imposed, except so far as by its express terms certain portions of those estates are exempted from such liability. He insists, in other words, that chapter 483 took effect from the date of its enactment, and not from the twentieth day thereafter.

The first section of the act is in these words:

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“ *After the passage of this act*, all property which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same while being a resident of the State, or which property shall be within this State . . . to any person or persons, or to a body politic or corporate, in trust or otherwise . . . other than to or for the use of father, mother, husband, wife, children, brother and sister, and lineal descendants born in lawful wedlock, and the wife or widow of a son and the husband of a daughter, and the societies, corporations and institutions now exempted by law from taxation, shall be and is subject to a tax of \$5 on every \$100 of the clear market value of such property, and at and after the same rate for any less amount, to be paid . . . in the city and county of New York to the comptroller thereof for the use of the State.”

The first six words of the section above quoted are admittedly the only words that are calculated to take the act which I am here interpreting from out the operation of § 12, title 4, chap. 7, part 1 of the Revised Statutes (*supra*).

Now, in ascertaining and determining whether those six words have the effect which is claimed for them by the district attorney, it must be borne in mind that the Constitution of this State puts no restriction whatever upon the authority of the legislature to make immediately effective all statutes which it may lawfully enact.

Counsel who are contending for the non-liability of these two estates under the so-called Collateral Inheritance act, must certainly concede that, but for the

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existence upon the statute book of § 12, *supra*, that act would have gone into operation on the date of its approval by the Governor, and that, too, even though the first six words of its first section formed no part of its provisions.

Prior to the enactment in Great Britain of the act of 33 George III, ch. 13, entitled "An act to prevent acts of Parliament from taking effect prior to the passing thereof," statutes became operative by relation from the first day of the session of the Parliament that had enacted them (4 *Coke Inst.*, 25 ; *Panter v. The Attorney-General*, 6 *Bro. Par. Rep.*, 486 ; *Latless v. Patten*, 4 *T. R.*, 660).

This doctrine, which, according to the express avowal of the act of 1793, had been productive of "gross and manifest injustice," had sprung from the fact that in the rolls of Parliament, made up after its adjournment, it had not been the custom to name any date except the date when that Parliament had assembled, and that, in fixing the time when statutes took effect, the courts had been furnished with no other guide than those rolls afforded. The statute of 1793 provided that there should thereafter be indorsed upon every act the day, month and year when the same should "pass and receive the royal assent," and that such indorsement should be taken to be a part of such act, and to be the date of its commencement where no other commencement should be therein provided. This rule has ever since prevailed in England. A like rule has obtained as regards national legislation in our own country. The Constitution of the United States is silent upon the subject,

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and the Congress has never, I think, undertaken to regulate it by any general provision (*The Brig Ann*, 1 *Gallison*, 62; *Matthews v. Zane*, 7 *Wheat.*, 164; *Warren M'f'g Co. v. Etna Ins. Co.*, 2 *Paine*, 501).

As regards the separate States of the American Union, there has been great diversity of action. In some of them, there are constitutional restraints more or less stringent upon legislative authority. In Maryland no law takes effect until the first day of June next after the session at which it has passed, "unless it be otherwise expressly declared therein" (Const. 1867, art. 3, § 31). There are similar provisions in the Constitution of Michigan (Const. of 1850, art. 4, § 20), and of West Virginia (Const. 1872, art. 6, § 30).

In Illinois, a law is inoperative until the first day of July next after its passage, "unless, in case of emergency, which emergency shall be expressed in the preamble or body of the act, the General Assembly shall otherwise direct" (Const. 1870, art. 4, § 13).

Similar restrictions are found in the fundamental laws of Colorado (Const. 1870, art. 5, § 19), of Missouri (Const. 1875, art. 4, § 36), of Nebraska (Const. 1875, art. 3, § 24), of Oregon (Const. 1857, art. 4, § 28), of Tennessee (Const. 1870, art. 2, § 20) and of Texas (Const. 1876, art. 3, § 39).

By the Constitution of Iowa, no law passed at a regular session takes effect until the fourth day of July next after its passage, unless the General Assembly "shall deem the law of immediate importance," in which event they may "provide for its taking effect by publication" (Const. of Iowa, 1857, art. 3, § 26).

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In Indiana, no act can become operative until it has been "published and circulated by authority, except in case of emergency, which emergency shall be declared in the preamble or the body of the law" (Const. of Ind., 1851, art. 4, § 28).

In Kansas and in Wisconsin no law of a general nature goes into effect until it has been published (Const. of Kan., 1859, art. 2, § 19; Const. of Wis., 1848, art. 7, § 21).

In several of the States, there is no constitutional restriction and no general legislative provision in the premises. Massachusetts, Maine, Connecticut, California, Minnesota, Nevada, New Jersey, New Hampshire, Georgia, North Carolina, Ohio, Rhode Island, Vermont and Virginia are without constitutional limitations upon the power of the legislature, but in each of those States there is a general statute, in terms not unlike our own, providing for the contingency of a failure on the part of the lawmaking power to indicate, with respect to any particular piece of legislation, the time of its going into operation.

Now, since § 12 (*supra*) came upon the statute book, it has been a frequent and well-nigh universal custom of the legislature to signify its intention that a law should go into immediate operation by a special section so declaring in express terms. Of the 557 statutes enacted in 1885 over 500 contain a section of that character. It must nevertheless be kept in mind that the legislature, unfettered as it is by constitutional restraints, is not bound to adopt this particular mode for making its laws effective from the date of their passage, but may accomplish that

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result by adopting any form of words satisfactorily evincing that such is its purpose.

Some of the counsel in this proceeding lay great stress upon the word "prescribed" in section 12 (*supra*), as if the legislature which enacted the Revised Statutes had by the use of that term put its successors under some species of restraint. But a legislative act cannot be insured against repeal, not even against repeal by implication.

"The later Parliament," says Lord COKE (1 Inst., 42, 43), "hath ever power to abrogate, suspend, qualify, explain or make void the former, in the whole or any part thereof, notwithstanding any words of restraint, prohibition or penalty."

Whether the Collateral Inheritance law took effect on the day when it was approved by the Governor, or did not take effect until a later period, is purely a question of the intention of the legislature which enacted it, as that intention can be gathered from its language. If that language fairly construed discovers a purpose of the law-makers that the act should become immediately operative, there is an end of the matter.

Now, what is the fair construction of the expression, "After the passing of this act," which stands at the very threshold of chap. 483? If that expression is considered quite apart from any supposed aid to its interpretation that may be afforded by reference to section 12, *ante*, it cannot be even plausibly contended that it means anything else than this: After the enactment of this bill into a law—after this bill shall

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have become a statute of the State, in some one of the modes established by the Constitution.

One who claims that "the passing of this act," as used in section 1, is equivalent in meaning to "the going into operation of this act," must resort of course to the general statutory provision heretofore quoted, to find the date to which, in his view, those expressions alike refer. He there finds that "every law unless, etc., etc., shall commence and take effect on and not before the twentieth day *after the day of its final passage.*"

The force of the word "passage," under *these* surroundings, is quite unmistakable. And it is equally unmistakable that the meaning which must there be assigned to it is of necessity the very meaning which it has in chapter 483. The contestants' argument ends, therefore, in a *reductio ad absurdum*.

I see no room for doubting that the first section of chapter 483 must be interpreted precisely as if there appeared therein, in place of the words "after the passing of this act," the words "after *June 10th, 1885.*"

Second. But it is claimed that section 1, even as thus paraphrased, fails to indicate an intention on the part of the legislature that the act of which it forms a part should become at once operative.

The word "after," it is urged, lacks definiteness and exactitude: It does not mean "from and after" or "immediately after," or "at all times after;" and there is, therefore, still a necessity of resorting to § 12 of the General Law to find the precise period

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when the passing of decedents' estates becomes taxable under chapter 483.

I have been referred to no reported decisions which seem to me to lend strong support to this contention. The cases relied upon by counsel are *Wheeler v. Chubbuck* (16 *Ill.*, 361); *Board of Supervisors v. Keady* (34 *Ill.*, 293); *Rice v. Ruddiman* (10 *Mich.*, 125), and *Charless v. Lamberson* (1 *Clarke, Iowa*, 436).

Wheeler v. Chubbuck was an action brought to recover from the defendant a penalty for suffering hogs to run at large, contrary to a statute of Illinois which was passed on January 27th, 1853. The statute declared that "from and after the first day of March *next*, it shall not be lawful," etc. A verdict was recovered against the defendant in the trial court, after a charge of the presiding justice that if the defendant had violated the statute at any time after March 1st, 1853, the plaintiff could recover. It was claimed by the appellants that the "March *next*" of the statute must be held to mean March, 1854, in view of art. 3, § 3, of the then existing Constitution of the State, which declared that "no public act of the General Assembly shall take effect or be in force until the expiration of sixty days from the end of the session at which the same may be passed, unless in case of emergency the General Assembly shall otherwise direct." This contention was sustained on appeal, the Supreme court holding that the legislature had not declared the existence of an emergency, and had not given the direction, without which, under the Constitution, no public act could take effect in thirty-one days after its passage. *Board of Supervisors v.*

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Keady is a reiteration of the same doctrine upon an essentially similar state of facts.

In *Rice v. Ruddiman* it was held that the legislature of Michigan, by a statute passed February 4th, 1859, providing for an election of county officers "at the annual township meeting to be held in April *next*," must be deemed to have intended that such election should take place in April, 1860, in view of the fact that the 1859 session of the legislature continued until May 16th, and that the Constitution of the State provided that no act, passed as was the act there in question, by less than a two thirds vote, could go into operation until ninety days after the close of the legislature that had enacted it.

The suit of *Charless v. Lamberson*, grew out of the following state of facts: The act known as the Code of Iowa was passed in February, 1851. Its 1249th section declared that a homestead might be sold on execution for debts contracted "prior to the passage of this law." It was held by the Supreme court that the section applied to debts contracted in April, 1851, or contracted at any subsequent period prior to July 1st, 1851, the day on which the Code took effect.

At first blush this decision seems apposite to the present situation. But the conclusion of the court was mainly based upon these two considerations, which are foreign to the case at bar: *First*—The State Constitution provided that no general law should take effect until it had first been published and circulated by authority, and the legislature in pursuance of that provision had caused publication to be made declaring that the Code should become operative on July 1st,

1851, and not sooner. *Second*—One of the sections of the Code expressly provided that the terms “heretofore” and “hereafter,” wherever they might appear, should be treated as relating to the time when the statute should take effect. Under these circumstances the court was of the opinion that the term “prior to the passage of this act” was substantially equivalent to the term “heretofore,” and covered all periods of time preceding July 1st, 1851, the date on which the act became operative.

While the cases upon which I have above commented can, as it seems to me, be readily and clearly distinguished from the case at bar, the claim that the expression “after the passage of this act” is not sufficiently definite to establish the very day of the act’s passing as the day of its going into operation has been so forcibly presented, that I might feel constrained to pronounce these two estates exempt from taxation but for a consideration which I now proceed to state.

Suppose it to be conceded that the words in controversy do not have the effect claimed for them by the district attorney, it by no means follows that those words are meaningless, nor indeed that, for the practical purposes of this proceeding, they may not be utterly fatal to the contestants’ claim of exemption.

Why has the legislature made use of them? They are surely not to be tossed aside as mere surplusage, if upon any fair and reasonable construction of the statute, they are found to serve an intelligent purpose.

According to the contestants, they have no force or value whatever. Strike them from the statute and its meaning is not altered a whit. Now, I cannot assent

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to this view. The preposition "after" expresses the relation between the word "passage" and some other word in the sentence wherein it appears. What is that word? Manifestly, it is either the word "pass" or the word "die." The tax for which the first section of the act provides is imposed upon all property which shall PASS after the passage of this act from a person who may die, etc., or upon all property which shall pass from any person who may DIE after the passage of this act. The two propositions are in substance the same.

Now, let it be admitted that this law did not "commence and take effect" until June 30th, 1887. Not until that date, upon this assumption, could the Surrogate appoint appraisers; not until then could he exercise the jurisdiction granted by section 13; not until then could he issue the citation for which section 16 makes provision. But the question still remains: To what estates was the act found to be applicable when it finally became operative? To the estates, it seems to me, of all persons who had died *at any time after its passage*, being "seized or possessed," etc., etc., as specified in the statute. This reading clears up the obscurity of the phraseology, assigns an intelligible and important meaning to words which the contestants can only deal with by pronouncing them surplusage, and is in accord with a recent well considered decision of the English Court of Appeal in *ex parte Rashleigh* (*L. R.*, 2 *Ch. Div.*, 9)—a decision which is so pertinent to the present situation that it seems proper to state in some detail the circumstances under which it was rendered. The "Bankruptcy Act,

1861," by which non traders were first made liable to the bankruptcy laws of England, provided by its 90th section that, as respected such non traders, the debt of the petitioning creditor must be a debt contracted "after the passing of this act." Section 232 declared that, as to the appointment of certain officers, the act should "commence and take effect from and after the passage thereof," and that "as to all other matters and things," it should take effect "from and after the 11th day of October, 1861." The statute received the royal assent on August 6th, 1861. It was subsequently repealed and another was substituted in its place. One of the sections of the new act (§ 118), provided that a non trader should not be adjudged a bankrupt in respect of a debt contracted "*before the date of the passing of the Bankruptcy Act, 1861.*"

It was held by the court below that a debt contracted in September, 1861, *i. e.*, between the date when the act of 1861 received the approval of the Sovereign and the date when that act went into operation, must be held to have been contracted *before* and not *after* its passage—in other words that the term "the passing of the act," as used in section 118, should be construed as meaning "the taking effect of the act." This judgment was reversed by the Court of Appeals with the concurrence of the four sitting judges, each of whom pronounced an opinion. It was held that the words "passing of the bankruptcy act, 1861," in § 118, *supra*, referred to the time when that act received the royal assent and not to the time when it went into operation.

Said JAMES, L. J.: "I am of opinion that the

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words 'the date of the passing of the Bankruptcy act, 1861,' mean what they say. They are English words, common words and words which have a fixed meaning in our language and law. They mean the time when the royal assent is given to a bill which has passed both houses of Parliament. That is the meaning of the words, and no court ought to depart from the plain meaning of plain English words unless coerced to do so by some very serious injustice."

MELLISH, L. J., said: "I am of the same opinion. The 118th section appears to me a perfectly easy section to construe, and the words must be taken in their natural sense. . . . The 232d section says that the act shall commence and take effect from and after the 11th day of October, 1861. *That means that nothing which is authorized to be done under that act can be done till after the 11th day of October; but that is all it says.* It follows that the 90th section is so far modified that no creditor could present his petition until after the 11th day of October, 1861; neither could a judgment debtors' summons be taken out until after the 11th of October, 1861, because the presenting of a petition in bankruptcy, or the taking out of a judgment debtors' summons, would be *something done* under the act. But to my mind it does not follow that nothing may then be done *in respect of any debt incurred after the passing of the act*, nor does it follow that the words 'after the passing of this act' are not to be read in their natural significance."

BAGALLEY, J., and BRETT, J., each announced his full concurrence in the views of his associates. The latter said, among other things: "I think the canon

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of construction here is that you must construe the 118th section according to its ordinary grammatical terms unless such construction would produce either an absurdity or a great injustice, so that it must be inferred that the Legislature did not mean to use the words in the ordinary sense."

It seems to me that the facts of the case just cited were much more favorable to the unsuccessful parties than are the facts in the present case to these objectors. The two cases would be more nearly parallel if in our act of 1885 there had been inserted, for example, a concluding section in these words: "This act shall take effect on the twentieth day after its passage." Even in that event it would seem to have been necessary, in order to give any effect whatever to the first six words of the statute, to hold the property of persons dying between June 10th and June 30th, no less than the property of persons dying after the latter date, subject to the burdens by the statute imposed.

My conclusion is that the estates of both these decedents are liable to the tax. Let a decree be entered accordingly.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SUBROGATE.—June, 1887.

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In the matter of the estate of REBECCA P. HOWARD, deceased.

Rights of inheritance, and of testamentary and intestate succession, being creatures of the municipal law, are entirely subject to its control and may be regulated, restricted and, *it seems*, even abrogated by statute. L. 1885, ch. 483, entitled "An act to tax gifts, legacies and collateral inheritances in certain cases," is to be properly regarded as imposing a tax upon the devolution of and succession to a decedent's property, and not upon the property itself.

The will of testatrix directed the executors thereof, as soon as convenient after death, to sell for cash all bonds which she should own at the time of her death, collect all moneys due, and divide and pay, out of the proceeds of sale and other funds, certain pecuniary legacies. No allusion was made to the possession of United States bonds, although a portion of the estate consisted of such securities. The executors, upon their accounting, having asked credit for a payment of moneys made to the comptroller under L. 1885, ch. 483, certain legatees objected and asked to be relieved from the burden imposed upon them so far as concerned the value of the bonds in question, upon the ground that the same were exempt from taxation.—

Held, that the tax imposed and paid was not upon property but upon the passing thereof; that the fact that a portion thereof consisted of government securities was immaterial; and that the objection must be overruled.

HEARING of objections to account of executors of decedent's will, filed in proceedings for judicial settlement.

EDWARD C. DELAVAN, JR., *for executors.*

GEO. C. GENET, *for objectors.*

JONATHAN MARSHALL, *special guardian.*

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THE SURROGATE.—This testatrix at the time of her death was a resident of the county and State of New York. Her executors having heretofore filed in this court an account of their proceedings now ask for its judicial settlement and determination. Among the items for which they claim credit is one of \$5,880.46 for so much moneys paid to the Comptroller of the city of New York as taxes under the so-called Collateral Inheritance act of June 10th, 1885 (L. 1885, ch. 483).

It is provided by § 6 of that act that “an executor having in charge or trust any legacy or property for distribution subject to the said tax, shall deduct the tax therefrom, or, if the legacy or property be in money, shall collect the tax thereon upon the appraised value thereof from the legatee or person entitled to such property.”

It is claimed, in behalf of certain legatees upon whom must fall in part the burden of taxation under this statute, that they are entitled to be relieved from that burden so far as concerns the sum paid by the respondents as a tax upon \$60,000, the value of certain United States bonds which came to the respondents' hands as a part of their decedent's estate.

One of the provisions of Mrs. Howard's will is in words following: “I direct that, as soon as may be convenient after my death, my executors shall sell for cash all bonds I shall own at the time of my death, collect all moneys . . . that I may then have on hand or that may be due and owing to me in any way, and, without unnecessary delay, divide and pay out, etc., etc.” Then follows a specification of cer-

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tain persons, and of certain legacies bequeathed to those persons respectively. Included in this list of beneficiaries are the contestants in this proceeding.

The first section of the Collateral Inheritance act is in these words: "All property which shall pass by will or by the intestate laws of this State, from any person who may die seized or possessed of the same while being a resident of the State, or which property shall be within this State . . . to any person or persons" [save certain excepted persons] . . . "in trust or otherwise . . . shall be and is subject to a tax of five dollars on every hundred dollars of the clear market value of such property . . . to be paid . . . in the city and county of New York to the Comptroller thereof for the use of the State."

It is claimed by these contestants that the tax, for which provision is thus made, is expressly imposed upon *property*, and that, so far as the testator's estate consisted at her death of United States bonds, it is absolutely exempt from taxation.

It appears, upon examination of her will, that it makes no allusion to her possession of United States bonds, and contains no provision bequeathing any such bonds to these contestants, or to any of them, or to any other person whosoever. On the contrary, her executors are directed to "sell for cash *all* bonds" that may constitute at her death a part of her estate, and to pay out of the proceeds of such sale, and out of the funds derived from other specified sources, certain pecuniary legacies, including the legacies to these contestants.

There may be some substance in the claim of the

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accounting parties that, even if specific bequests of Government securities might be deemed exempt from taxation under this act, so that a legatee thereof could compel their delivery without abatement, these objectors, to whom are bequeathed mere general legacies of money, are nevertheless chargeable with the tax. In support of this contention, I am referred to certain authorities holding that the doctrine of equitable conversion has such an application to succession tax laws, that where a testator has positively directed the sale of real property, for example, and the employment of the proceeds for the use of a *cestui que trust*, the interest of such *cestui que trust* is liable to the succession tax even though he may have taken the property *in specie*, without previous conversion by his trustees (Attorney General v. Halford, 1 *Price*, 426; Williams v. Advocate General, 10 *Cl. & Fin.*, 1; Miller v. Commonwealth, 111 *Pa.*, 321).

It was held by the Supreme court of Pennsylvania, in the case last cited, that although the lands of a decedent situated without that State were not subject to the collateral inheritance tax imposed by its laws, his positive testamentary direction to sell such land and to pay the proceeds to a legatee had the effect of fastening upon those proceeds the quality of personal assets within the State, and of making them, as such, liable to the tax.

I am disposed to think, however, that, if the State of New York is entitled to the tax here claimed to have been erroneously paid to the Comptroller, its right thereto rests upon a broader foundation than has been laid for it by any particular testamentary direc-

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tions to the executors as to the manner of dealing with the estate prior to its distribution. And for this reason among others: The Statute of 1885 cannot be construed as discriminating between the property of intestate decedents and the property of testators, as regards the liability of the one and the other to the payment of the tax by that statute imposed. It does not contemplate, for example, that the property of one whose entire estate may consist of Government bonds, shall be liable to tax in the event of his dying intestate, though he might have relieved his estate from that burden by bestowing such bonds in specific bequests to the objects of his bounty, and would nevertheless have been powerless to afford it such relief by the disposition of his estate in general pecuniary legacies.

It seems to me that the action of the executors must be sustained, if it is sustained at all, upon the ground that, although in form of words the tax imposed by the statute in question is a property tax, it is not essentially a property tax at all, but is rather a tax upon the devolution or succession of property passing from a person deceased to his heirs, next of kin, devisees and legatees.

The theory upon which these contestants rely was recently pressed upon the consideration of our Court of Appeals in the Matter of McPherson (104 *N. Y.*, 306), but no intimation as to its soundness or unsoundness is given in the decision of that cause.

The precise matter there under consideration was the question whether the Collateral Inheritance act was or was not obnoxious to the Constitution of this

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State, and it was said by Judge EARL, who pronounced the opinion of the court, that, for the solution of that question, it was entirely immaterial whether the act was to be regarded as imposing a tax upon *property* or as imposing it upon the *passing* of property.

The question thus left undetermined in Matter of McPherson is one of paramount importance in the case at bar. If the tax in dispute is in a strict sense a tax upon property, it may be claimed, with much force, that a decedent's estate, so far as it consists of United States bonds, is wholly exempt from taxation. If, on the other hand, the tax is imposed upon the "passing" of such decedent's property, the question whether the property consists in whole or in part of United States bonds is wholly immaterial.

The doctrine asserted by Sir William Blackstone in Chapter 1, Book 2 of his Commentaries has been repeatedly asserted by the courts of this country. "The universal law of almost every nation," he says, "has given a dying person a power of continuing his property by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition of it at all, the municipal law of the country steps in and declares who shall be the successor, representative or heir of the deceased, . . . and in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, . . . the doctrine of escheats is adopted in almost every country, whereby the sovereign of the State, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be founded.

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. . . . Wills, therefore, and testaments, rights of inheritance and successions are all of them creatures of the civil or municipal law, and accordingly are in all respects regulated by them."

The sovereign power of this State may, if it chooses, abrogate the existing statutes of wills and of distribution, and, as regards personal property that may be possessed at his death by any person residing within its limits, may direct that the same shall become exclusively the property of the State. If it can thus exert absolute authority in the premises it may of course wield such limited authority as it may see fit to exercise. It may appropriate to itself a prescribed portion of the decedent's possessions and permit his kindred or the objects of his testamentary bounty to enjoy the rest.

The legislature of New York had power, therefore, to declare, at the time of the enactment of the law here in question, that henceforth the personal estate of a resident decedent, in excess of the sum necessary for discharging his debts, should not all of it pass, as it would theretofore have passed, to his legatees or his next of kin; that only ninety-five *per centum* thereof should so pass, and that the remaining five *per centum* should escheat to the State. This authority was in no manner dependent upon the character of the decedent's property. Even if it should consist exclusively of United States bonds, the State had power to direct that five *per centum* of the whole amount of such bonds should flow into its treasury.

It seems to me, therefore, that the only practical question here presented, is the question whether the

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legislature of 1885 has, *in fact*, exercised the authority above referred to, or whether it has, either intentionally and of set purpose, or unintentionally by careless phraseology, failed to impose a tax upon the succession or devolution of a decedent's property and imposed a tax upon the property itself, with the result of exempting from taxation such portions of his estate as consist of securities of the general Government.

The title of the act here in question is, "An act to tax gifts, legacies and collateral inheritances in certain cases." Its substantial provisions and much of its phraseology are borrowed from a similar statute of Pennsylvania. In interpreting its language it is instructive, therefore, to examine the Pennsylvania act and the construction given to its provisions by the courts of that State.

The law of Pennsylvania declares that "All *estates*, real, personal and mixed of every kind whatsoever, *passing* from any person who may die seized or possessed of such estate, being within this commonwealth, either by will or under the intestate laws thereof . . . other than to or for the use of, etc., etc., . . . shall be and they are hereby made subject to a tax or duty of," etc., etc.

In *Strode v. The Commonwealth* (52 *Penn. St.*, 181), the trial court held that the fact that a decedent's estate had consisted in part of United States bonds did not *pro tanto* relieve it from taxation under the statute just quoted. The appellant claimed that this decision was at variance with the Act of Congress of February 15th, 1862, and with the principle established in *McCulloch v. Maryland* (4 *Wheat.*, 316), and

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affirmed in numerous later cases, that the several States "had no power by taxation or otherwise to retard, impede, burthen or in any way control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

In holding that this doctrine had no restrictive operation upon the power of the State to impose a collateral inheritance tax, the court of first resort declared that that tax was not a tax upon property at all, but was in substance and effect a bonus exacted from a decedent's legatees, devisees and distributees, as the condition on which they were permitted to succeed to his estate. The right of the owner of property to dispose of it by will and of his kindred to take it in case he should die intestate, was declared to depend solely upon municipal regulation.

The trial court, whose decision was reviewed in *Clymer v. The Commonwealth* (52 *Penn.*, 185), said: "This law (meaning the Collateral Inheritance Law), contemplates the imposition of no tax such as Congress intended to prohibit" (referring to the United States statute of February 25th, 1862). "It is called a tax or duty, but it has little if any analogy to a tax in the usual acceptation of the term. . . . It is not to be viewed as a tax assessed upon the estate of a decedent, or of any one, but as a restriction upon the right of acquisition by those who, under the law regulating the transmission of property, are entitled to take as beneficiaries. The State is made one of the beneficiaries. It lays its hands upon estates under such circumstances and claims a share; whether its

share is exacted as a tax, or duty, or whatsoever else, and whether the machinery employed in levying an ordinary tax is adopted or not is of no consequence." The decisions in the two cases above cited were affirmed on appeal.

In pronouncing the opinion of the court of last resort in *Matter of Strode*, WOODWARD, C. J., said: "The mistake of the counsel for the plaintiff in error consists, we conceive, in treating this as a tax of Government bonds when it is really a tax upon the estate of a decedent dying without lineal heirs. And it does not help the argument that the bulk of the estate is made up of these bonds; for that estate passed into the hands of the executor for administration, and is taxed in his hands *as an estate*. The law takes every decedent's estate into custody, administers it for the benefit of creditors, legatees, devisees and heirs, and delivers the residue that remains, after discharging all obligations, to the distributees entitled to receive it. One of the legal obligations to which every estate that is to go to collateral kindred is subject, is this five *per cent.* duty to the Commonwealth. And it is not until this work of administration is performed that the right of succession attaches. The distributees may indeed consent to accept certain goods and chattels without conversion, but such arrangement in no case affects the theory of the law that the estate is first to be administered and then enjoyed." This doctrine was recently reasserted in *Orcutt's Appeal* (97 *Penn. St.*, 179).

Collateral Inheritance laws similar to the present law of New York have long been in force in Virginia

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and Maryland. Section 6 of chapter 39 of the Virginia Code of 1849 provided that "where any *estate* of any decedent within this Commonwealth" should "*pass* under his will or the laws regulating descents or distributions, to any other person or for any other use than to or for the use of," etc., . . . the estate so passing should be subjected to a certain specified tax.

In *Eyre v. Jacob* (14 *Gratt.*, 422) may be found a very elaborate decision by the Court of Appeals of Virginia as to the significance and effect of these statutes. It was claimed by counsel who were attacking their constitutionality, that their provisions were violative of the Constitution of the Commonwealth which declared that taxation should be equal and uniform. The court said, in pronouncing its opinion: "If this tax were properly to be considered as a tax on property, there would be great force in the argument of counsel; . . . but such I think is not its true character. . . . The intention of the legislature was to tax the *transmission* of property by devise or descent to collateral kindred; to require that a party thus taking the benefit of a certain right, secured to him under the law, should pay a certain premium for its enjoyment; and as it was thought just and reasonable that the amount of the premium should have a certain proportion to the value of the subject enjoyed, it is fixed at a certain *per centum* upon the value of the estate transmitted."

The Collateral Inheritance tax was abolished in Virginia in 1855. It was subsequently reimposed in 1863, in terms substantially such as had been adopted in the earlier statute. The Virginia Court of Appeals

reiterated in *Miller v. The Commonwealth* (27 *Gratt.*, 110) that the tax was not to be regarded as a tax upon "property," and declared that certain specific charitable institutions which had been relieved by statute from general taxation, were nevertheless subject to the liabilities of the Collateral Inheritance act, in the absence of special exemption in the act itself.

The Maryland Code of Public General Laws, art. 81, § 124, declares that "All *estates*, real, personal and mixed, money, public and private securities for money of every kind, *passing* from any person who may die seized and possessed thereof to any person or persons other than to or for the use of, etc., shall be subject" to a certain specified tax.

The constitutionality of this act, as a law imposing a tax upon the devolution or succession of property, was sustained by the Maryland Court of Appeals in *Tyson v. State* (28 *Md.*, 577).

Now so far as concerns the question here to be determined, the phraseology of ch. 483 differs from the phraseology of the kindred statutes of Pennsylvania, Virginia and Maryland, in this particular only: that in the one case the tax is imposed upon *the passing of property*, while in the other cases it is imposed upon *the passing of estates*. I am clear, however, that this is a distinction without a difference. The word "property" and the word "estate" are convertible terms, both of which, however, have double significations. Each of them means, under some circumstances, the *right* of ownership; the *right* of possessing, enjoying and disposing of a thing; the *interest* that one has therein. Each of them means, under

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other circumstances, the tangible *subject* of ownership and possession ; the very *res* itself.

The doctrine of the Pennsylvania, Virginia and Maryland cases above cited seems, therefore, to be applicable to the case at bar. I hold that this doctrine is sound and that the objections to the account of these executors must be overruled.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—June, 1887.

MATTER OF COOPER.

In the matter of the estate of GEORGE COOPER, deceased.

Testator, by his will bequeathed to Lizzie C. Williams “all the furniture, bedding, ornaments and *paraphernalia*” of which he died possessed.—*Held*, that a watch and a few articles of clothing and jewelry, which the inventory disclosed, were the *paraphernalia*, to which the legatee was entitled.

SETTLEMENT of decree, upon judicial settlement of account of executor of decedent’s will.

P. J. JOACHIMSEN, *for executor.*

BUTLER, STILLMAN & HUBBARD, *for widow.*

ELBERT CRANDALL, *for L. C. Williams.*

THE SURROGATE.—This testator has bequeathed to Miss Williams “all the furniture, bedding, ornaments and *paraphernalia*” of which he died possessed. The

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only other dispositive provisions of his will are a bequest to the same legatee of \$2,500 in money and the gift to his wife of his entire residuary estate. It appears from the inventory that the testator left a watch and a few articles of clothing, jewelry and personal ornaments, which counsel for Miss Williams claims to be included in the term "paraphernalia."

In its strict legal sense, that term has no possible application to the property of a *man*; its meaning in common parlance is so vague and indefinite that it may justly be said to be incapable of precise definition. Etymologically the word means "beyond or besides dower." By the civil law a woman was not constrained to bring her whole substance as a portion to her husband; she could retain a part of it, and that part was called her *paraphernalia*. In England, the expression *paraphernalia* was formerly understood to cover such jewels, wearing apparel and personal ornaments, worn by a woman during her marriage, as were suitable to the quality and station in life of her husband. These she could claim after his death against all persons except his creditors (2 Burns Ecc. Law, 456).

Applying the doctrine of *noscitur a sociis* to the testamentary provision here in question, it seems reasonable to suppose that if the testator meant anything by the word "paraphernalia," in making a bequest of his "furniture, bedding, ornaments *and* paraphernalia," he meant such jewels, apparel and personal ornaments as he might leave at his death, or such of them at least as were suitable to his station in life and his circumstances. If suitability to circumstances is an

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element worthy consideration, I cannot doubt that, in view of the value of this testator's estate, his indulgence in watches, jewelry, coats, trousers, etc., etc., was modest and unassuming.

The decree may provide for the delivery of these paraphernalia to Miss Williams.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—June, 1887.

MATTER OF SEARS.

In the matter of the estate of ISAAC H. SMITH, deceased.

Where the circumstances of one of two testamentary trustees are such as not to afford adequate security for the proper discharge of his duties, he cannot be relieved from furnishing a bond by establishing the solvency and responsibility of his associate.

PETITION of Lydia E. Sears, *cestui que trust* under decedent's will, for a decree requiring Clarence H. Smith, the trustee, to give security for the performance of the duties of his trust.

BANGS, STETSON, TRACY & McVEAGH, *for petitioner.*

NATHAN LEWIS, *for trustee.*

THE SURROGATE.—Section 2815 of the Code of Civil Procedure provides that a testamentary trustee may be required to give security for the performance of his trust, under circumstances which would warrant the exaction of security as a condition precedent to the issuing of letters testamentary to an executor.

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Section 2636 provides that, after a will has been admitted to probate, the person named therein as executor, if competent to serve, etc., is entitled to letters testamentary, unless, before such letters are granted, a creditor or person interested in the estate interposes legal objections to their issuance. One of such legal objections is discovered to exist, if the "circumstances" of the executor whose claim to letters is challenged, "are such that they do not afford adequate security for the due administration of the estate. Section 2638 provides that, in spite of an objection of that character, an executor may entitle himself to letters by giving a bond as prescribed by law.

Now, it has been held that where a will names two or more persons as its executors, and an objection has been interposed to the grant of letters to one of them and to one only, the issuance of letters should be suspended not only as to him but as to any and all of his co-executors, until the question raised by the objection has been determined (*McGregor v. Buel*, 24 *N. Y.*, 166).

It would seem to follow that where, as in the case at bar, the circumstances of one of two testamentary trustees are such as not to afford adequate security for the proper discharge of his duties, he cannot be relieved from furnishing a bond merely by establishing that his co-trustee is solvent and responsible.

The prayer of the petition must be granted.

MATTER OF RUTHERFORD.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—June, 1887.

MATTER OF RUTHERFORD.

In the matter of the estate of OLIVER H. JONES, deceased.

The beneficiary of a testamentary trust having executed an instrument acknowledging the receipt, from the trustees, of all the income of the trust fund for her benefit, accrued up to a specified date, and releasing the trustees from all liability except as respected the *corpus* of such trust fund, afterwards petitioned for an accounting and interposed an objection to the account filed, setting forth that petitioner had not received the income from the beginning of the trust up to the date in question, nor any account thereof.—

Held, that the instrument described furnished the trustees with *prima facie* evidence of the truth of its admissions, and did not preclude petitioner from showing that the full amount of income had not in fact come to her hands.

A trustee who had paid moneys to the beneficiary of the income of a trust fund, at a time when no income was due, cannot be allowed to reimburse himself out of the income of the trust subsequently coming to his hands.

The provisions of 1 R. S., 730, § 63, which declare the beneficial interest of a *cestui que trust* in the rents and profits of lands inalienable, are applicable to trusts for the payment of the income of personalty.

A claim, on the part of a testamentary trustee, against a balance of income of the trust fund in his hands, arising from an alleged indebtedness, to him, of the beneficiary of such income, is a demand of set-off which cannot be adjusted in a Surrogate's court.

One of two testamentary trustees who has assented to the act of the other in borrowing funds of the trust upon the security of a mortgage made payable with interest, at a rate greater than that subsequently established by law, until the principal indebtedness should be discharged, though liable for the principal, cannot be held for more than legal interest, in the absence of proof of a personal benefit accruing from the transaction.

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HEARING of exceptions to report of referee.

DILLAWAY, DAVENPORT & LEEDS, *for cestui que trust.*

SAMUEL JONES, and NORTH, WARD & WAGSTAFF, *for trustees.*

THE SURROGATE.—By the will of this testator his executors and trustees, of whom these respondents, Oliver L. Jones and John L. Gardiner, are the sole survivors, were directed to invest the sum of \$25,000 out of the assets of his estate, and to apply the income thereof to the use of his daughter, Martha L. Rutherford, during her life.

In November, 1883, Mrs. Rutherford commenced in this court a proceeding for an accounting by her trustees, and for the payment to her of any balance of income found to be her due. In response to the citation in such proceeding, each of the respondents filed a separate account.

In the account of Gardiner, it was set forth that the accounting party had received certain sums as income of the trust estate, and had paid the same to this petitioner; that, on October 20th, 1877, the petitioner had executed a release, whereby she had acknowledged the receipt of all income which had theretofore accrued, and that subsequent to the date of such release no income of the trust estate had come to his hands.

The release was also claimed by the account of trustee Jones to preclude any inquiry into transactions between himself and the petitioner prior to October 27th, 1877. He charged himself with \$9,561.04 as interest on the fund from the date last named until November 1st, 1883, and claimed credit for divers

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sums amounting in all to \$9,571.21, thus showing an overpayment to the *cestui que trust* of \$10.17.

To these accounts the petitioner interposed various objections, in one of which she made the allegation following: "There is no release from her to said Jones or said Gardiner which is binding upon her; she denies that she has ever given said Jones or said Gardiner any release with knowledge of the accounts or proceedings of said Jones or his co-trustee, and that whatever release was given was given under compulsion and not freely."

On the day of the filing of these objections, the respondent Gardiner submitted an affidavit, wherein he alleged that "more than six years had elapsed between the execution and the delivery of the instrument in the account herein mentioned" (meaning the release aforesaid), "and the bringing of this proceeding, and all causes of action for setting aside or disturbing said instrument are barred by the Statute of Limitations."

The two accounts and the objections thereto were sent to a reference. At one of the early hearings before the referee, the petitioner filed this additional objection: "The petitioner has not received the income of this estate from the beginning of the trust up to October 27th, 1877, nor any account thereof." The alleged release was then put in evidence. It admits that the petitioner had received from these respondents certain personal property to which she was entitled under the testator's will, and all the income of the trust fund for her benefit, and in consideration of the premises, and of the sum of one dollar, it releases

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the respondents from all liability except as respects the *corpus* of such trust fund.

After this instrument had been received in evidence the petitioner sought to inquire into the transactions of the respondents from a time prior to its execution, and offered to prove that on the day it was executed it was not true that she had in fact been paid all the income to which she had become entitled. The referee declined to hear any evidence upon this subject, basing his refusal upon the authority of *Fraenznick v. Miller* (1 *Dem.*, 136) and *Woodruff v. Woodruff* (3 *Dem.*, 505), and upon the intimation of counsel that the petitioner had applied to the Surrogate for an order directing her trustees to render an account of their transactions prior to the alleged release, and that her application had been denied for lack of jurisdiction to grant it.

The records of this court do not show that such an application was ever formally passed upon, or indeed that it was ever submitted for the Surrogate's action. If it had been so submitted and had been denied, as it might very properly have been denied upon the pleadings as they stood when the reference was ordered, the Surrogate might nevertheless have granted it if he had been appealed to anew, after the interposition of the contestant's additional objection distinctly charging that some portion at least of the income that had accrued prior to October 27th, 1877, had been withheld. I think that the referee should have received the testimony offered by the petitioner and excluded under the mistaken notion that its exclusion was called for by a previous ruling of the

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Surrogate (Schmidt v. Heusner, 4 *Dem.*, 275; Reilley v. Duffy, *id.*, 366).

So far as the release in question relates to property of the estate apart from the trust fund involved in the present accounting, this court has nothing to do with it. There were other persons besides the petitioner entitled to share in such property, and, in distributing it among the several parties entitled, the respondents may have acted upon the release in such a way as to estop the petitioner from attacking it. But as regards the income of the trust fund this petitioner alone was concerned, and when she executed a paper acknowledging that she had received all the income that had theretofore accrued, it seems to me that she simply furnished the trustees with *prima facie* evidence that such was the case, and did not preclude herself from showing that the full amount of that income had not in fact come to her hands (Matter of Peyser, 6 *N. Y. Surr. Dec.*, 175). She was entitled to it *all*, and as, in paying over *all*, the trustees would have done no more than their simple duty, the so-called release, so far as it relates to such income, lacks that element of mutuality, which is the essential basis of an estoppel.

The petitioner's exceptions to the referee's refusal to permit an inquiry into transactions prior to the release would therefore be sustained, and the proceeding remitted to the referee for the introduction of the excluded evidence, but for the fact disclosed by the respondent's answer to a petition lately filed in this court by the respondent Jones, praying that he be discharged from his trust. The answer shows

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that she has brought in the Supreme court an action, which is now pending, whereby she seeks to set aside the release. It is proper under these circumstances that the decree to be entered in the present proceeding should leave undetermined the question of any claims that the petitioner may have against the accounting parties for their management of the trust for her benefit, prior to October 27th, 1877.

The reasons given by the referee for declining to allow the accounting parties credit for moneys retained by them from the petitioner's income, in satisfaction of her alleged indebtedness to one of their number, are, in my judgment, satisfactory.

The doctrine that a trustee who has paid moneys to the beneficiary of the income of a trust fund, at a time when no income was due, cannot be allowed to reimburse himself out of the income of the trust subsequently coming to his hands, seems to be firmly established in the law of this State.

Counsel for the accounting parties, in his elaborate and interesting brief, argues that the provisions of § 63, tit. 2, ch. 1, part 2 of the Revised Statutes (3 Banks, 7th ed., 2182), which declare the beneficial interest of a *cestui que trust* in the rents and profits of lands, inalienable, have no application to trusts for the payment of income of personalty; he insists that while the contrary notion has been asserted in certain decided cases, it has never received the positive sanction of our highest court and has been doubted and disapproved by inferior tribunals. I lately had occasion in Matter of Hoyt (*ante*, 432), to consider with some care the question here under discussion,

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and felt constrained, in view of the cases there cited, to hold that income from the personalty of a trust estate no less than income from its realty is inalienable under § 63, *supra*. If this conclusion is correct, it is manifest that nothing which this petitioner may have done or omitted to do, can have authorized her trustees to reimburse themselves, out of the income in their hands, for moneys advanced to her before such income had accrued.

I think, too, that the petitioner's counsel must be sustained in his contention that the claim of trustee Jones against the balance of income in his hands is a claim of set-off between parties in different rights, and could not be allowed in this proceeding, even if there were no limitations upon the jurisdiction of the Surrogate's court in such matters (*Whitaker v. Rush*, *Amb.*, 407; *Freeman v. Lomas*, 9 *Hare*, 109; *Medlicot v. Bowes*, 1 *Ves. Sr.*, 207; *Middleton v. Pollock*, 20 *L. R. Eq.*, 29; *Gale v. Luttrell*, 1 *F. & J.*, 180; *Perry v. Bale*, 1 *Dem.*, 452; *Matter of Livingston*, 27 *Hun*, 607). And even if the mutual demands between the petitioner and her trustee might be the subject of set-off in a court of general jurisdiction, they cannot be here adjusted (*Stillwell v. Carpenter*, 5 *N. Y.*, 414).

As I understand the evidence, however, the referee's finding that on January 31st, 1884, the sum of \$5,183.14 was due from the trustees as balance of income, must be somewhat modified, and for the following reason: This finding is based in part upon a concession made by the petitioner, for the purposes of this proceeding, that all the income which accrued

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after October 27th, 1877, and prior to January 1st, 1881, has been paid.

The referee holds that the trustees are chargeable with interest upon the Jones mortgage from the date last named until January 31st, 1884, and, while he allows them certain credits amounting to \$194.48 for disbursements on the petitioner's account, he gives them no credit at all for moneys paid during that period to the petitioner herself. It appears by the evidence, as summed up in the stipulation annexed to the referee's report, that the moneys so paid amount in all to \$1,350. I think that the respondents may justly insist that for a portion of this \$1,350 credit should be given them in this accounting. The only reason why they cannot be credited with all of it, is the fact that, during the period referred to, trustee Jones is shown to have collected rents of property not connected with the trust, in which collections the petitioner had an interest of \$840.94. If, as regards such portion of the \$1,350 as was needed to discharge the trustees' obligation to the petitioner on account of these rents, the respondents cannot be credited in this accounting, it is nevertheless true that they may properly be credited with the surplus—*i. e.*, with the sum of \$509.06. Before these accounts were filed, certain changes were made in the investments of the trust property to which this petitioner has not objected. As a result, the principal of the fund was reduced from \$25,000 to \$24,911.10. That amount is secured by a mortgage executed by Jones to Gardiner and to Louisa L. Jones, now deceased, who was in her lifetime executrix of this estate. It is needless to cite

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authorities in support of the proposition that a trustee cannot lawfully borrow the trust fund in his charge. The findings of the referee to this effect must be sustained.

By the terms of the above named mortgage which was executed on October 13th, 1873, the mortgagor Jones bound himself to pay interest at the rate of seven per cent. until his principal indebtedness should be discharged. In view of the decision of the Court of Appeals in *O'Brien v. Young* (95 *N. Y.*, 428) it would seem that, notwithstanding the statute reducing the legal rate of interest in this State, interest at seven per cent. has been chargeable upon the mortgage from the date of its creation.

While the respondent Jones was guilty of a breach of trust in borrowing the fund for which he gave his mortgage as security, his associate cannot urge that fact as a bar to his own liability to be charged with interest at 7 per cent. It is not denied by trustee Gardiner that he assented to the loan of the fund to his co-trustee, so that his liability for the principal fund is undoubted. He would not, however, be personally bound by the contract of the mortgagor to pay interest at 7 per cent., and, if the petitioner were now pursuing him for his misconduct in assenting to the loan, he could not be held for more than legal interest, in the absence of evidence that he had personally profited by the transaction; but the petitioner now seeks to charge him for his neglect in failing to collect interest at 7 per cent. as it fell due. The referee was warranted in finding that the petitioner's claim is well founded.

MATTER OF MINTURN.

The report of the referee, with the modifications hereinbefore specified, is confirmed, and a decree to that effect may be entered accordingly.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—June, 1887.

MATTER OF MINTURN.

In the matter of the petition of JOHN C. MINTURN, a legatee under the will of CORNELIA MINTURN, deceased.

The will of the testatrix, who died September 29th, 1882, gave her whole estate to her executors in trust, to pay the entire net income thereof to her brother J., during his natural life, with remainder over. In September, 1886, J. having presented a petition to the Surrogate's court setting forth that he had received from the trustees no income since November, 1885, and praying that accrued income in their hands be paid to him, it appeared that, among the effects of testatrix had been found an instrument of "agreement," under seal, signed by J., executed shortly after the execution of a codicil to the will, reciting the foregoing testamentary provision, and containing a covenant by J. that, after he should have received such income for three years, he would execute and deliver to the executors a release and discharge thereof for any future time. There was no direct evidence that testatrix had ever avowed an intention of altering her testamentary dispositions so as to limit J.'s interest in her posthumous estate to the three years in question. J. died before the matter was determined.—

Held, that decedent's possession of the instrument at her death was *prima facie* evidence of its delivery to her by J. in his lifetime; that, in the absence of evidence to the contrary, the agreement must be deemed to have been made in pursuance of an understanding, without which

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decedent would have revoked her will, or so altered its provisions as to accomplish the result contemplated by the instrument in controversy; and that, the claim of J.'s executor must be denied.

PETITION by John C. Minturn, a beneficiary under decedent's will, praying for a decree requiring the executors to pay to him certain income alleged to be due and payable to him by the terms of that instrument.

HENRY THOMPSON, *for John Minturn, for the motion.*

HERBERT B. TURNER, *for executors.*

THE SURROGATE.—This testatrix died on September 29th, 1882, having theretofore made and executed two written instruments, which, in November of that year, were admitted to probate as together constituting her last will and testament. One of these instruments, the will proper, was executed on June 5th, 1880; the other, a codicil, on April 19th, 1882. By the eighth article of the earlier paper the decedent's entire estate is given to her executors, in trust "for these uses and purposes, viz.; to pay the entire net income thereof semi-annually to my brother John C. Minturn during his natural life, and, on the death of my said brother, to pay," etc., etc. Then follows a gift of legacies to relatives and friends of the testatrix and to certain religious and charitable institutions. The only substantial change effected by the codicil is the addition of the names of three persons to the list of the beneficiaries specified in the eighth article of the will.

On September 7th, 1886, John C. Minturn filed in this court a petition, wherein he alleged that since November, 1885, he had received from the trustees no income of the residuary estate. He prayed for an

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order directing that such income as had accrued in their hands be paid to him, in accordance with the provisions of the will. To this petition the trustees interposed an answer. They admitted that they were in possession of accrued income, amounting to about \$7,000, and proceeded to say that "as to whether the petitioner is entitled to receive such income, and as to whether there is any other person entitled to priority of payment of the same, these respondents submit to the judgment of the court, after due consideration of all the facts."

One of the facts above referred to is the following: Among the effects of the testatrix which came into the hands of her executors after her decease, was an instrument under seal bearing the signature of her brother John C. Minturn, and dated May 1st, 1882, just two weeks after the execution of the codicil to her will. The instrument is in these words:

"This agreement . . . between John C. Minturn of the city of New York, party of the first part, and Cornelia Minturn of the same place, party of the second part: Whereas the party of the second part has heretofore made and published her last will and testament according to law, wherein and whereby she has, among other things, provided in substance that the income arising or to arise from her residuary estate should be paid to and received by the party of the first part during the term of his natural life, in case he should survive the party of the second part: Now, therefore, in consideration of the premises, and of the sum of one dollar to me in hand paid by the party of the second part, the receipt whereof is hereby acknowl-

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edged, the party of the first part doth hereby covenant and agree that, after he shall have received from the executors of the will of the said party of the second part such income for the space of three years, he will execute and deliver, in due form of law, to the said executors, a release and discharge of the said income for any future time beyond the said three years."

The trustees asked the direction of the court as to whether, in view of the terms of the instrument above quoted, they would be justified in paying to the petitioner any portion of the income that had accrued since the expiration of the third year from the decedent's death.

Upon the suggestion of the Surrogate that all persons who might be affected by the decision of that question should be brought in as parties, and upon the discovery thereupon that the trustees were about to account, the consideration of Mr. Minturn's petition was postponed until such account should be filed. It was filed on October 5th, 1886. Five days later Mr. Minturn died. The representative of his estate now claims that, in the decree about to be entered in the accounting proceeding, provision should be made for the payment to himself of all the income of the estate up to October 10th, 1886.

It is insisted by counsel for the trustees that the agreement above set forth operated upon Mr. Minturn in his lifetime, and now operates upon the executor of his estate, as an equitable estoppel of the right of either to claim any portion of the income now in the trustee's hands. If the evidence establishes that,

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prior to the date of the agreement, the testatrix had formed a purpose of cutting down the interest of her brother John in the income of her residuary estate, from an interest for life to an interest for three years, and that she was dissuaded from making a will or codicil for effecting that purpose, by John's promise and assurance that if she should suffer her testamentary dispositions to remain unchanged, he would surrender all claims to income accruing after the expiration of three years from her death, there can be no doubt that the application of John's representative must be denied.

In *Chamberlaine v Chamberlaine* (*Freem. Ch.*, 34 [1678]), a decedent had made a will whereby certain lands had been devised to his son and a pecuniary legacy had been bequeathed to his daughter. He resolved to alter his will and make these legacies a charge upon his lands, fearing that the personal assets of his estate might be insufficient for their satisfaction. Thereupon his son said that if no alteration should be made in the will, he would pay the legacies himself. The will was left unchanged at the testator's death. Held, that the son was bound to pay the legacies.

A testator made a will appointing his wife his executrix. He was induced to substitute his son in place of his wife, upon the son's promise to act as trustee for his mother's benefit. Held, that a trust which equity should enforce was fastened upon the son's conscience (*Thynn v. Thynn*, 1 *Vern.*, 296 [1684]).

A testator who had resolved to devise a part of his

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estate to his godson was prevailed upon to devise it all to his wife, upon her promise to give the godson such portion as the testator had originally intended him to have. The wife was held bound to fulfil her promise (*Devenish v. Baines, Prec. in Ch.*, 3 [1689]).

A testator devised lands to his brother, who was named executor of his will, and directed the payment of an annuity to his nephew. He would have charged this annuity upon the real estate if the executor had not promised to pay it. Held, that it became a charge in the same manner as if the will had so ordered (*Oldham v. Litchfield*, 3 *Vern.*, 506 [1705]).

A testatrix who had made a will whereby she had bequeathed a bond to A., afterwards made another by which she bequeathed such bond to B., upon B.'s promise to give it, at her own death, to A. Held, that B.'s declarations after the execution of the second will were admissible to prove such promise, and that after B.'s death A. could recover the bond of B.'s representative (*Drakeford v. Wilks*, 3 *Atk.*, 539 [1747]).

A testator had left his will in the hands of A., his nephew, who was named therein as executor and residuary legatee. The testator having decided to reconsider its provisions and make a bequest of one hundred pounds to B., another nephew, A. declared that no such change need be made, as he would himself, at his uncle's death, pay B. the sum intended for him. The testator died, leaving his will as originally written. Held, that the executor was bound to pay B. one hundred pounds out of the residue (*Reech v. Kennegal*, 1 *Ves. Sen.*, 123 [1748]).

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One who had made a will, giving legacies to his wife and sister, requested his executor, the residuary legatee, to see to it that those legacies were increased in a sum specified. The executor promised accordingly. The testator made no new will. Held, that a trust was thus created which equity could enforce (*Barrow v. Greenough*, 3 *Ves.*, 152 [1796]).

A. was about to make a will bequeathing a certain fund to B. C., who in the event of A.'s intestacy would take his estate, dissuaded A. from carrying out his intention, promising that in the event of his dying intestate, he (C.) would take the estate as B.'s trustee. Held that upon A.'s death the equitable ownership of his estate passed to B. (*Williams v. Fish*, 18 *N. Y.*, 546 [1859]). See also to similar effect: *Stickland v. Aldridge*, 9 *Ves.*, 516 [1804]; *Mestaer v. Gillespie*, 11 *Ves.*, 638 [1805]; *Chamberlain v. Agar*, 2 *Ves. & B.*, 259 [1813]; *Owing's Case*, 1 *Bland's Ch.*, 370 [1826]; *Hoge v. Hoge*, 1 *Watt's (Pa.)* 163 [1832]; *Podmore v. Gunning*, 7 *Sim.*, 644 [1836]; *Jones v. McKee*, 3 *Pa. St.*, 496 [1846]; *Russell v. Jackson*, 10 *Hare*, 204 [1852]; *Walgrave v. Tebbs*, 2 *K. & J.*, 318, 321 [1855]; *Church v. Ruland*, 64 *Pa. St.*, 432 [1870]; *Brook v. Chappell*, 34 *Wis.*, 405 [1874]; *Dowd v. Tucker*, 41 *Conn.*, 197 [1874]; *Williams v. Vreeland*, 32 *N. J. Eq.*, 135 [1880]; *O'Hara v. Dudley*, 95 *N. Y.*, 403 [1884].

Now there is nothing in the facts and circumstances of the case at bar calculated to take it out of the doctrine established in the cases above cited. To be sure there is here no direct evidence, such as was presented in many of those cases, of actual personal conference

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between the decedent and the beneficiary who was declared a trustee *ex maleficio*, nor is it shown by direct evidence that this testatrix ever avowed an intention of so altering her testamentary dispositions as to limit her brother John's interest in her posthumous estate to the enjoyment of the income thereof for three years; but in place of such evidence we have an instrument under seal whose probative force is quite as effective.

Miss Minturn's possession of that instrument at her death is *prima facie* evidence that it had been delivered to her by her brother John in his lifetime (Chandler v. Temple, 4 *Cush.*, 285; Carnes v. Platt, 41 *N. Y. Sup'r C.*, 435; Boody v. Davis, 20 *N. H.*, 140; Tunison v. Chamblin, 88 *Ill.*, 379, 387). The presumption that it was so delivered has not been overthrown, and, indeed, has been in no manner assailed.

The instrument bears the signature of John C. Minturn, and expressly recites that it is an *agreement* entered into between himself and this testatrix. In the absence of any evidence to the contrary, it is fair to conclude from this recital that Minturn's promise, which is here sought to be enforced, was not only made with the knowledge and approval of the testatrix, but was made in pursuance of an understanding, in the absence of which she would or might have revoked her will, or have supplemented it by a codicil which would have accomplished the very result contemplated by the instrument here in controversy.

The application of Mr. Minturn's executor must be denied.

MATTER OF SHARP.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—June, 1887.

MATTER OF SHARP.

In the matter of the estate of FIDA C. SHARP, deceased.

An executor or administrator cannot lawfully embark in trade the assets of his decedent's estate, though, in so doing, he believes he is acting for the best interests of the legatees or distributees, and the creditors. Contracts made by him, in such behalf, will bind him personally, but not the estate committed to his charge.

He is not, however, bound, as of course, at the death of his decedent, to make immediate conversion into money of assets of the estate which were employed in trade by the latter in his lifetime; but may, within reasonable limits make purchases and incur liabilities, where such a course is demanded by the best interests of the estate.

Testatrix, who, during several years before her death, was engaged in business on her own account, by her will, bequeathed to her executor such property as remained after payment of her debts and funeral and testamentary expenses, in trust to apply so much of the income as should be needed for the maintenance and education of her son until he arrived at the age of twenty-five years; and directed her executor to carry on some legitimate business for the benefit of such son.—

Held, that the will did not authorize the employment of the entire *corpus* of the estate in continuing the business in which testator had been engaged, but only the residue after payment of debts and the charges mentioned, and that an application to be allowed to intervene upon the settlement of the executor's account, made by one who had recovered a judgment against the executor personally, for the value of goods purchased by the executor and consumed in continuing such business, should be denied.

DURING the progress of a reference of the account and objections thereto, of the executors of decedent's will, certain questions arose for the determination of the court, the nature of which appears from the opinion.

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ALEXANDER V. CAMPBELL, *for executor.*

W. S. LOGAN, BURRILL, ZABRISKIE & BURRILL, *and* EDWARD P. WILDER, *for other parties.*

L. W. EMERSON, *special guardian.*

THE SURROGATE.—This decedent died in April, 1885, leaving a will by which she appointed her husband, Aurelius S. Sharp, as her executor. In March last he filed an account of his administration. Objections were interposed thereto by divers persons claiming an interest in the estate, and the issues thus raised were submitted to a referee. Pending the reference, certain questions have arisen upon which I am now asked to pass.

It appears that for several years prior to her death the testatrix was engaged in this city in the business of a tailor. This business her husband continued with the assets held by him as executor and in the name of "The estate of Fida C. Sharp." Between July 20th, 1885, and October 20th, of that year, he is alleged to have purchased on credit a quantity of merchandise from Niland Brothers & Lange and to have consumed the same in the conduct of the aforesaid business. The claim of the vendors having been thereafter assigned, Charles Littman, the assignee, brought an action thereon in the Supreme court, and recovered judgment against the executor personally in the sum of \$570.81. Mr. Littman now asks leave to intervene as a creditor of the estate in the proceeding for the settlement of the executor's account. This application is opposed by certain of the parties to the proceeding, claiming to be creditors of the testatrix; and in behalf of one of such creditors I am

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asked to direct the entry of an order striking from the account all items relating either to the receipt or to the disbursement of moneys in connection with the business carried on by the executor after the death of the testatrix.

First. Is Mr. Littman's claim to intervene entitled to recognition?

The doctrine seems to be well established, that, in general, an executor or administrator cannot lawfully embark in trade the assets of his decedent's estate, even though in adopting such a course he may verily believe that he is acting for the best interests of the legatees, or distributees and the creditors. He has, as a rule, no power to charge the assets in his hands by contracts originating with himself. Such contracts will bind him personally, but will not bind the estate committed to his keeping (*Labouchere v. Tupper*, 11 *Moore P. C.*, 189, 221; *Stedman v. Fiedler*, 20 *N. Y.*, 437, 446; *Sumner v. Williams*, 8 *Mass.*, 162, 199; *Taylor v. Mygatt*, 26 *Conn.*, 184; *Clopton v. Cholson*, 53 *Miss.*, 466; *McKay v. Royal*, 7 *Jones, N. C.*, *Law*, 426; *Fitzhugh v. Fitzhugh*, 11 *Gratt.*, 300; *Davis v. French*, 20 *Me.*, 21; *Wade v. Pope*, 44 *Ala.*, 690; *McFarlin v. Stinson*, 66 *Ga.*, 396; *Lovell v. Field*, 5 *Vt.*, 218; *Austin v. Munroe*, 47 *N. Y.*, 360).

Said ALLEN, J., pronouncing the opinion of the Court of Appeals in the case last cited: "Contracts of executors, *although made in the interest and for the benefit of the estate* they represent, if made upon a new and independent consideration, as for services rendered, goods or property sold and delivered, or other consideration moving between the promisee and

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the executors as promisors, are the personal contracts of the executors, and do not bind the estate, notwithstanding the services rendered or goods or property furnished, or other consideration moving from the promisee, are such that the executors could properly have paid for the same from the assets and been allowed for the expenditure in the settlement of their accounts. . . . The rule is too well established in this State to be questioned or disregarded, and any departure from it would be mischievous." This doctrine has since been reasserted in *Morgan v. Stevens* 6 *Abb. N. C.*, 356, 362); *Bloodgood v. Sears* (64 *Barb.*, 71, 76); *Stanton v. King* (8 *Hun*, 4); *Murphy v. Hall* (38 *Hun*, 529); *Wetmore v. Porter* (92 *N. Y.*, 76, 82); *Barry v. Lambert* (98 *N. Y.*, 300, 308).

It is claimed that the doctrine of the foregoing cases is inapplicable to the present situation because of the express testamentary directions of this decedent respecting the management of her estate. The provisions of her will are substantially as follows:

Article first directs the payment of funeral and testamentary expenses and of all just debts. By article second the testatrix bequeaths to her executor such property as shall remain "*after the payments made as above directed,*" in trust to apply the income thereof, or such part of such income as shall be needed, for the maintenance and education of her son, Henry A. Sharp, until he shall arrive at the age of twenty-five years. Says article fourth: "I direct that after my death some legitimate business shall be carried on by my executors for the benefit of my said son

Harry, and that my said husband shall be retained as the manager thereof, at a salary of \$1,500 per annum."

It is clear that the provision last quoted cannot be treated as a direction for the employment of the *totum corpus* of the estate in the continuance of the business in which the testatrix was engaged at her decease. On the contrary, only that portion of the estate in excess of the sum necessary for the satisfaction of the debts and the funeral and testamentary expenses, is made applicable by the will to the purposes of the "legitimate business" which the executor is instructed to carry on for the benefit of Henry A. Sharp. No other portion of the estate stands charged with the debts which the executor has contracted since his wife's decease (*Ex parte* Garland, 10 *Ves.*, 110; *Ex parte* Richardson, 3 *Madd.*, 138; *Thompson v. Andrews*, 1 *M. & K.*, 116; *McNeillie v. Acton*, 4 *DeG. M. & G.*, 744; *Lucht v. Behrens*, 28 *Ohio St.*, 231, 238; *Ferry v. Laible*, 27 *N. J. Eq.*, 146; *Cutbush v. Cutbush*, 1 *Beav.*, 185)."

Said the Master of the Rolls, in the case last cited: "Without authority in the will executors have no right to deal with the property of the testator and carry on trade with his assets. A party therefore who relies on the credit of a testator's estate should look to the will to ascertain the extent to which the testator has authorized his assets to be embarked in the trade."

Mr. Littmann's application to intervene must therefore be denied.

Second. This case is not ripe for a decision of the motion to strike out of the account such items of debit

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and credit as the executor has seen fit to insert concerning his conduct of the business above referred to. It is only after a hearing upon the objections interposed by the several parties in interest that a proper determination in this regard can be arrived at.

Even apart from any special authority conferred upon him by the will, the executor was not bound as of course at the death of the testatrix to make immediate conversion into money of the assets of the estate which were then involved in trade. He was at liberty, within reasonable limits, to make purchases and to incur liabilities, if, under the circumstances then existing, that course seemed to be demanded by the best interests of the estate. Whether he exceeded these reasonable limits can only be ascertained after investigation.

I think it proper to declare, however, for the guidance of the referee, that the decision of the Supreme court in the Second Department, in the suit of Willis and others against this executor, is not to be regarded in the present proceeding as controlling the question now under consideration, except so far as it has established the rights of the plaintiffs in that action to share in the assets of this estate. The complaint of those plaintiffs alleged that the defendant had been engaged in business under authority conferred by his decedent's will; that merchandise, useful and necessary for the purposes of such business, had been by them sold and delivered to the defendant as decedent's executor; that this estate had enjoyed the full benefit of the merchandise so purchased; that payment therefor could not be recovered of the de-

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fendant for the reason that he was pecuniarily irresponsible, but that the estate in his charge was solvent.

The matter came before the Supreme court on demurrer, so that all the above allegations were taken as true. In the opinion of the court at General Term it is declared that the action not being an action at law to charge the executor upon contract, but a suit in equity to charge an estate which had received the benefit of the goods for which the plaintiffs claimed compensation, the demurrer should be overruled.

Now, if the actual condition of this estate is shown by the account, it differs essentially from its condition as set forth in the complaint in *Willis v. Sharp*. The judgment recovered by the plaintiffs in that action affords, therefore, no criterion for testing the validity of claims similar to the one there sued upon, or the propriety of allowing the executor credit for the purchases for which credit is claimed in his account.

Let the trial before the referee proceed.

MATTER OF ROUX.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—June, 1887.

MATTER OF ROUX.

In the matter of the estate of ALEXANDER ROUX, deceased.

Where a testator's residuary estate is held in trust, and occasion arises for the appointment of an administrator with the will annexed, the beneficiary of the trust is entitled to letters in preference to the trustee.
Matter of Thompson, 28 *How. Pr.*, 581—followed.

PETITION for letters of administration with the will of decedent annexed.

COUDERT BROS., for Alex J. Roux.

EDMOND HUERSTEL, for Isabel F. Roux.

THE SURROGATE.—Section 2643 of the Code of Civil Procedure declares the order of priority in the issue of letters of administration, *c. t. a.*, upon a testator's estate. Some one of the residuary legatees is entitled in preference to any other person. It was decided by the Supreme court of this State, in Matter of Thompson (33 *Barb.*, 334) that where a testator's residuary estate is held in trust, and occasion arises for the appointment of an administrator, *c. t. a.*, the beneficiary of the trust is entitled to letters in preference to his trustee.

The decision above cited was affirmed by the Court of Appeals (28 *How. Pr.*, 581), and must control my

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disposition of the question submitted for decision in the case at bar.

I have signed an order directing the issuance of letters to the petitioner, Alexander J. Roux.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—July, 1887.

MATTER OF TILFORD.

In the matter of the estate of JOHN B. TILFORD, deceased.

An annuity, or a provision in the nature of an annuity, for the payment of which resort may be had to the income of a fund, but which is not directed to be discharged from such income exclusively, is an alienable interest, and a charge upon both income and corpus.

Hunter v. Hunter, 17 *Barb.*, 25 ; Griffin v. Ford, 1 *Bosw.*, 123—compared. Testator's will provided : " I give to my wife \$6,000 per year, during her life, for her support. I give to each of my children not less than \$600 nor more than \$1,500 per year for their education and support until they become twenty-five years of age, as my executrix and executor may think proper. As each of my children becomes twenty-five years of age, my executrix and executor shall give each child \$50,000." It also gave the executors power to make investments and private sales. Upon an application for construction of these provisions, it was contended, *inter alia*, that the will attempted an unlawful suspension of the power of alienation,—*Held*,

1. That the provision for the widow was a simple annuity, alienable at the pleasure of the beneficiary.
2. That the first provisions for the children, whether to be regarded as strict annuities, or bequests in the nature of annuities, or as creating alienable trust interests, were valid and effectual.
3. That the legacies of \$50,000, each, to the children were not vested but contingent.
4. That there was no disposition of the residuary estate, which, accordingly, must be disposed of as in case of intestacy.

MATTER OF TILFORD.

CONSTRUCTION of will upon application for its admission to probate.

HAWKESWORTH & RANKINE, *for proponents.*

EUSTACE CONWAY, *special guardian.*

THE SURROGATE.—An instrument purporting to be the last will and testament of this decedent and to dispose of personal property whereof he died possessed is about to be admitted to probate. Pursuant to § 2624 of the Code of Civil Procedure I am asked to pass upon the validity, construction and effect of its very inartificial provisions.

The testator left him surviving a wife and three infant children. The first clause of his will bequeaths small pecuniary legacies to certain specified persons. The second is in these words: "I give to my wife \$6,000 per year during her life for her support." The third is as follows: "I give to each of my children not less than \$600 nor more than \$1,500 per year for their education and support until they become twenty-five years of age, as my executrix and executor may think proper. As each of my children becomes twenty-five years of age, my executrix and executor shall give each child \$50,000. My executrix and executor are given full power and authority to make any investments of my estate as they may think proper, without regard to any laws regulating trust or other estates and to make private sales of any of my property."

It is claimed that as no particular portion of the residuary estate is directed to be set apart for the satisfaction of each of the foregoing bequests, I am

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bound to hold that the testator has undertaken to constitute his entire residuary estate a trust fund, single and indivisible, for the annual payment of the \$6,000 to his wife and the \$600—\$1,500 to each of his children, and for the payment to each of the children of \$50,000 upon their severally attaining the age of twenty-five years; and that this attempted trust is invalid and ineffectual, for the reason that its enforcement would involve a suspension of the absolute ownership of personal property for a longer period than two lives in being at the testator's death.

This contention involves the notion that the testator contemplated that no part of the *corpus* of his estate should be distributed until the death of the last survivor of the four persons interested in the provisions above quoted, except that the sum of \$50,000 should be distributed to each of the children upon his attaining the age of twenty-five years; that save for this exception the entire estate must, if the will be obeyed, be held intact to supply the income for the discharge of the annual payments directed by the will.

If it be true that the *corpus* of the estate must, even in the event of the death of two or more of the children in the lifetime of the widow and before reaching the age of twenty-five years, or in the event of the death of the widow and of one or two of the children not having attained that age, continue to be held for the benefit of the survivor or survivors, then the will certainly contemplates an unlawful suspension of the power of alienation.

But it seems to me that this was not the purpose of

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the testator. The provision for the benefit of the widow is a simple annuity. There is no designation of the source from which it must be paid, nor is there any intimation of a wish that the income rather than the *corpus* should be exclusively or primarily devoted to its satisfaction. Indeed, the will contains no express authorization for the collection or for the disposition of income; and though such authority is probably implied in the direction to invest and change investments, that direction by no means justifies the inference that the testator intended that the annuity for his widow should be paid out of income alone or that the income should be exhausted before resort could be had to the principal for its satisfaction.

The income will naturally be the primary source from which, if the provision in question is upheld, it will in fact be satisfied, but the beneficiary can compel a resort to the *corpus* at any time if the income shall prove inadequate. The annuity being thus charged upon both *corpus* and income, and not being connected with any trust, is an interest which the law regards as alienable at the pleasure of the beneficiary; and is not therefore under the ban of the statute against perpetuities (1829, *Bradhurst v. Bradhurst*, 1 *Paige*, 331, 346; 1836, *Hawley v. James*, 16 *Wend.*, 61; 1839, *Gott v. Cook*, 7 *Paige*, 521, 535; 1840, s. c., *sub. nom.* *Cane v. Gott*, 24 *Wend.*, 641, 664; 1840, *Maurice v. Graham*, 8 *Paige*, 483; 1844, *De Graw v. Clason*, 11 *Paige*, 136; 1848, *Mason v. Jones*, 2 *Barb.*, 229, 242, 247; 1852, *Lang v. Ropke*, 5 *Sandf.*, 363; 1853, *McGowan v. McGowan*, 2 *Duer*, 59; 1853, *Hunter v. Hunter*, 17 *Barb.*, 25, 92; 1857, *Griffen v.*

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Ford, 1 *Bosw.*, 123 ; 1868, Killam v. Allen, 52 *Barb.*, 605 ; 1882, Johnson v. Cornwall, 26 *Hun*, 499, *affi'd*, 91 *N. Y.*, 660).

It follows that the bequest to the testator's widow is of itself valid, and that it must therefore be upheld unless the bequest to his children is ineffectual, and the two bequests are so interdependent that neither can stand alone. The only noticeable particulars wherein the latter provision differs from the one already considered are these : that the latter provision is not a gift of a definite annuity *simpliciter*, but is an annual gift of a sum to be determined by the executors, in the exercise from time to time of a limited discretion, which sum is to be applied to the children's education and support.

These features of the legacy now under consideration do not, in any legal sense, distinguish it from the legacy to the widow. The grant of discretionary authority to the executors to fix the amount to be applied for the children's support and education, and the grant of authority to make and change investments, may not unreasonably be regarded as indicating an expectation on the part of the decedent that resort would be had to the income of the residuary estate for meeting the annual payments ; but it is true of these bequests as of the bequests to the widow, that the will contains no direction and no suggestion of a direction that the executors shall discharge them wholly out of the income. I am clear that in the event of insufficiency of income the principal estate could properly be depleted for their satisfaction. The doctrine that an annuity, or a provision in the nature of an

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annuity, for the payment of which resort *may* be had to the income of a fund, but which is not *directed* to be discharged from such income exclusively, is an alienable interest and a charge upon both income and *corpus*, is recognized in several of the cases already cited (see *Hawley v. James*, *Gott v. Cook*, *Maurice v. Graham*, *DeGraw v. Glason*, *Lang v. Ropke*, *McGowan v. McGowan*, *Griffen v. Ford*, *Killam v. Allen*, *Hunter v. Hunter*, *supra*).

In the case last named, a testator after giving an annuity of \$300, payable out of the income of his estate, directed his executors to provide for the education of his grandchildren out of the income, and made the annuity a charge upon such income. The court held that there was no suspension of the power of alienation, as the annuity "might be personally released by the children but for their minority, and a suspension resulting simply from minority is not such as is contemplated by the statute." In *Griffen v. Ford*, there was a gift to trustees for this purpose among others: "to apply out of the income so much thereof as is necessary for the support and maintenance" of a person named. There was a direction to pay the beneficiary in the event of her marriage an annuity of \$100 out of such income during her life. It was held that the trust was not such a trust as suspended the power of alienation but was "in its nature an annuity."

The cases referred to are like the case at bar, both as regards indefiniteness in the amount of the bequests, and as regards the purposes to which such bequests were made applicable.

Whether the provisions for the children of this testator are to be regarded as in strictness annuities, or as bequests in the nature of annuities, or as creating alienable trust interests, I am of the opinion that they are valid and effectual. It is competent for the executors to set apart separate funds for their satisfaction and for the satisfaction of the widow's annuity, and it would seem to be their duty so to do under the will (Lang v. Ropke, *supra.*, Gott v. Cook, *supra.*, p. 525; Hunter v. Hunter, *supra.*, p. 35, 92; Slanning v. Style, 3 *P. Wm's*, 336; Stanway v. Styles, 2 *Eq. Cas. Abr.*, 246; Stephenson v. Axson, 1 *Bailey [S. C.] Eq.*, 274; Fryer v. Buttar, 8 *Sim.*, 442; Batten v. Earnley, 2 *P. W'ms*, 162; Healey v. Toppan, 45 *N. H.*, 243, 264; Nutter v. Vickery, 64 *Me.*, 490).

The testator's provision that as each of his children shall become twenty-five years of age the executors shall give him \$50,000 is entirely independent of the provision for the children's support and maintenance in the interval. There is no present gift of these legacies with a direction for future payment, but the notion of futurity is a part of their very substance. The interests of the legatees therefore are not vested but contingent (Knight v. Knight, 2 *Sim. & St.*, 490; Paterson v. Ellis, 11 *Wend.*, 259, 271; Emmons v. Cairns, 3 *Barb.*, 243; Jansen v. Cairnes, 3 *Barb. Ch.*, 350; Warner v. Durant, 76 *N. Y.*, 133; Everitt v. Everitt, 29 *N. Y.*, 39; Murray v. Tancred, 10 *Sim.*, 465; Smith v. Edwards, 88 *N. Y.*, 92).

The testator has made no disposition of his residuary estate. It appears that after payment of the debts, the legacies bequeathed by the first clause of the will,

and the appropriation of such portion of the assets as may be needed to meet the annuities and charges, there is likely to be a residuum. Such residuum, together with so much of the income of the sums appropriated as shall not be consumed in satisfying the said annuities and charges, and such of the funds appropriated as may hereafter be relieved from the burden with which they are charged, must be distributed as in case of intestacy.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—July, 1887.

JENNINGS v. BARRY.

*In the matter of the judicial settlement of the account
of JOSEPH G. JENNINGS, as administrator, with
the will of SAMUEL S. BARRY, deceased, annexed.*

The courts favor the vesting of legacies. To postpone the vesting of a residuary estate, clear evidence of an intent to produce such a result must be presented.

Words of survivorship, in a will, should, if no special intent be manifested to the contrary, be referred to the date of the death of the testator.

It is not a rule that, where legacies to two or more are *made payable*, by the will, at a future time, and there is a provision that, in case of the death of one legatee before his legacy is payable, the same shall go to the survivors,—the bequests are *contingent*.

Testator by his will, gave his estate, both real and personal, to his executors, in trust to sell and convert the same,—except his residence and furniture, of which his wife was to have the use for life,—into money, and, after paying certain general legacies, to invest the remaining proceeds for the benefit of the wife, for life, in a manner specified; further providing that, “after” the widow’s death, the said premises and fur-

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niture be sold, and the proceeds, together with the principal of the fund so invested, "be equally divided and one portion thereof paid" to a son, A.; one to a daughter, B.; one to a daughter, C., for life, with remainder over; one to the children of a deceased daughter, D.; and one to a grandson, E. "In case of the death of" A., B., C. or E., "before having received the portion above devised" to them, leaving issue, him, her or them surviving, the same was to be divided "among the children of the deceased, equally"; but, "in the event" of any or either of such beneficiaries "thus dying, without leaving issue them surviving," he ordered and directed that "the portion to which he or she would have been entitled be divided equally *among the survivors* of them share and share alike."

A., E. and B. died during the widow's lifetime, the last named without, and the others leaving, issue. The widow having died, and the entire estate being converted, the court was called upon to construe the will, in order to effect a final distribution.—*Held*,

1. That the remainders to A., B., C., E., and the children of D., were legacies, and vested at testator's death.
2. That the words of survivorship, italicized, referred to the period of distribution fixed by the will, viz.: the time of the death of the widow, and that C. accordingly took, alone, the portion which B. would have received had she survived.
3. That the children of D. had no right as "survivors," under the clause last construed.

Testator in his lifetime had a claim for \$2,000 against E., upon which the executors recovered a judgment against the latter, which they presented as a set-off against the share of E.'s children.—

Held, that the set-off should be allowed.

Manice v. Manice, 43 N. Y., 369—compared.

Matter of Mahan, 98 N. Y., 372—distinguished.

THE decedent left a last will and testament, in and by which he gave his estate, real and personal, to his wife, Antoinette, and to Gould J. Jennings, his executors, in trust, for the purposes therein specified. They were directed to convert the personal estate into money, and sell and convey all of his real estate, except the house and lot in Yonkers where he resided, which, with the furniture therein, he gave to his wife for life. He then proceeded to make a disposition of the remainder of his property, thus: he ordered and

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directed to be paid five legacies, of \$1,000 each, to certain persons and classes named. Then followed the sixth clause :

“*Sixth.* I order and direct my said executrix and executor to invest, upon bond and mortgage, at the largest rate of interest practicable, all the rest, residue and remainder of the avails of my said estate, and pay to my wife, Antoinette, the net increase and income arising therefrom, semiannually, during her natural life, for her use and support, which, together with the bequest to her heretofore made, is to be received and accepted by her in lieu of all dower and right of dower. After the demise of my wife, I order and direct that the said premises, known as No. ninety-nine Warburton avenue, together with the said household furniture, be sold, and the proceeds of such sale, together with the principal of the fund for her benefit invested, shall be equally divided, and one portion thereof paid to my son Robert Alexander Barry ; one portion thereof to be paid to my daughter Rebecca Shinn Ireland, wife of Henry Ireland, deceased ; one portion thereof to my daughter, Elizabeth Ann Jennings, wife of Joseph H. Jennings, for her sole and separate use during the term of her natural life, and from and immediately after her decease to be equally divided among the children of her, the said Elizabeth Ann Jennings, her surviving, share and share alike ; one portion thereof to the children of my deceased daughter, Priscilla Chandler Bowne, in equal portions ; and the remaining portion to my grandson, William Robert Hull. In case of the death of any or either of my said children, Robert Alexander Barry,

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Rebecca Shinn Ireland, Elizabeth Ann Jennings or my grandson William Robert Hull, before having received the portion above devised to them, and leaving issue him, her or them surviving, I order and direct that the same be divided among the children of the deceased, equally, share and share alike. In the event of any or either of my said children, or my grandson, thus dying without leaving issue them surviving, I order and direct that the portion, to which he or she would have been entitled, be divided equally among the survivors of them, share and share alike."

Robert A. Barry, William R. Hull and Mrs. Ireland died before the widow; all leaving issue except Mrs. Ireland. The testator had a claim of \$2,000 against the grandson, Hull. The executors subsequently recovered a judgment against him for the same, which was now presented as an off-set against the share of the estate belonging to his children. The amount of the estate, including the debt against the grandson, and exclusive of the house devised to the widow for life, was about \$22,000. That house, since her death, had been sold for \$7,000. The executors were both dead, and Joseph G. Jennings was now the administrator, with the will annexed.

S. H. THAYER, JR., *for administrator.*

HESS & TOWNSEND, *for children of Robert A. Barry, deceased.*

J. ADRIANCE BUSH, *for Mrs. Jennings and others.*

EDWIN MORE, JR., and W. P. PLATT, *for general guardian of Hull minors.*

C. L. ANDRUS, *for children of Priscilla C. Browne, deceased.*

W. M. SKINNER, JR., *special guardian for Henry J. McCarter minor, grandson of Robert A. Barry, deceased.*

THE SURROGATE.—A construction of the will of the testator is involved in the accounting proceeding now pending. It seems to be necessary to determine three questions. These are, 1st, the period when the legacies over, after the death of the widow, vested; 2d, to what period of time did the provision as to survivors relate; 3d, can the children of Mrs. Browne be considered as among the "survivors" provided for in the will. These questions will be considered in their order.

The most difficult of solution is the first one. It is chiefly important, because its decision will determine whether the amount of the judgment against Hull is, or is not, a proper subject of set-off against the share bequeathed to him, or to his issue in case of his death. On a casual examination of the numerous authorities, on the subject as to when a legacy is vested, and when contingent, there would seem to be much conflict of opinion among the courts of this country, as well as in England; but a more careful study of them largely dispels the idea, and convinces one that the apparent differences of views and rules established are due rather to the ever varying language of testamentary instruments, as affecting intention. One of the leading cases on this subject, decided by the Court for the Correction of Errors, in this State, is that of *Moore v. Lyons* (25 *Wend.*, 119). The will read: "I give and devise unto the said negro woman, Mary, my dwelling house and lot of ground, etc., to have and to hold the same unto her, the said Mary, for and during her natural life, and, *from and after her death*, I give and devise the said dwelling house

and lot of land to Susan, Jane and Betsey, three daughters of said Mary, or to *the survivors or survivor of them*, their or her heirs or assigns forever." The court held that the remainders were vested and not contingent, and that they did so actually vest at the death of the testator; and also, that survivorship should, in all cases, if there be no special intent manifested to the contrary, be referred to the period of the death of the testator. It was also held that the same rules applied to legacies. These rules were applied in the case of *Weed v. Aldrich* (2 *Hun*, 531).

Jarman says, if the postponement of payment appear to have reference to the situation or convenience of the estate, as, if land be devised to A. for life, remainder to B. in fee, charged with a legacy to C., payable at the death of A., the legacy will vest *instanter*; and consequently, if C. die before the day of payment, his representatives will be entitled (2 *Jarm. on Wills*, [5th Am. ed.], 450). So, where a sum of stock is bequeathed to A. for life; and, *after his decease*, to trustees upon trust to sell and pay and divide the proceeds to and between C. and D., or to pay certain legacies thereout to C. and D.; as the payment or distribution is evidently deferred until the decease of A., for the purpose of giving precedence to his life interest, the ulterior legatees take a vested interest at the decease of the testator. This doctrine prevails as well in gifts to a class as to individuals (*id.*, 458; citing many cases). A gift over, in case of the legatee's death before the period of distribution, will not generally prevent the application of this doctrine (*Shrimpton v. Shrimpton*, 31

Beav., 425). The mere introduction, into an ulterior gift, of new words of disposition has no effect in postponing the vesting. Thus, where a testator bequeaths personalty to trustees, in trust for A. for life, adding: "and after her decease, *then I give*," etc., these words do not postpone the gift to the posterior legatee until the decease of A., but merely show that this is the period at which it will take effect in possession (*Benyon v. Maddison*, 2 *B. C. C.*, 75). *Shipman v. Rollins* (98 *N. Y.*, 311) is cited as an authority sustaining the view that these legacies over did not vest until the death of the life tenant. It was so held in that case, because of the peculiar provisions of the will, from which it was ascertained to be the intention of the testator that they should not vest until "then." In the case of *Miller v. McBlain* (*id.*, 517), cited on the same point, the only question decided was that, after an estate had vested in one of several, and where it was provided that, on the death of any one, that one's estate should go to the survivors, the estate so vested could not be divested by the death of one after the period fixed for distribution. The court thought it clear that the words of survivorship related to the expiration of the life estate and the period of distribution. The will gave the widow something more than a life estate. All of the testator's estate was given to her, "*to be used and enjoyed by her, at her own discretion*, during her natural life," and then "*whatever may remain . . . is to be disposed of as follows*." Then the testator provides that certain sums due from his children are to be added to the estate, after the death of his wife, the whole then to

be divided into twelve equal parts, "*which I hereby give and devise, absolutely and wholly*, one share to each of my children." This language, upon which the court laid much stress, and the other provisions of the will fully justified it in holding that the intention of the testator was that no part of his estate should vest in his children until the termination of the life estate. The will now being considered differs, in its essential features, from both of those last referred to.

It appears that courts favor the vesting of legacies. In regard to their vesting, a leading distinction is, that if futurity is annexed to the *substance* of the gift, the vesting is suspended, as where there is a gift to A. at the age of twenty-one years; but if it relate to the time of payment only, the legacy vests *instanter*. FOLGER, J., in *Loder v. Hatfield* (71 N. Y., 52), in speaking of the postponement as being annexed to the *substance of the gift*, defines the phrase thus: "or as it is sometimes put, unless it be upon an event of such a nature that it is to be presumed that the testator meant to make no gift unless that event happened." That would be a violent presumption here, as the testator knew the event would certainly happen. Futurity here is not annexed to the substance of the gift. And so, if the postponement of payment appear to have reference to the situation or convenience of the estate, the legacy will vest at once.

Here the bequests to the children were of personal property. The real estate was all equitably converted into personalty at the death of the testator, except

the house and lot reserved, and that became thus converted at her death. The postponement of the sale of that, as it was for the convenience of the estate, would hardly be a sufficient cause, of itself, to prevent a vesting of the legacies. Numerous cases will be found where specific property was given to trustees to collect and apply the income to the use of a life beneficiary, and, at the death of the life tenant, to sell and divide the proceeds among certain legatees in remainder, and the legacies were held to vest in the latter on the death of the testator. Why should there be any distinction made, in this respect, between real estate and government bonds? If the testator had directed the trustees to invest in stocks and bonds, and then ordered them sold, at the death of his wife, the legacies would have vested at once. Can it justly make any difference that the money was to be raised by the sale, then, of land, instead? In both cases, the prices they will bring at a future period, would be uncertain. The question of vesting, or not vesting does not depend upon the ascertaining of an exact sum. In this case, the amount of the personal estate at the death of the testator could have been approximately ascertained, and, but for the postponement of the sale of one parcel of the real estate, there could have been no doubt, aside from the survivorship provision, that the legacies to the children and grandchild, vested *instanter*. Indeed, a will may be made in such terms that a portion of a bequest shall vest at once, and the other portion be contingent. The case of *Dominick v. Moore* (2 *Bradf.*, 201), though not

strictly in point, was very similar to this in some of its features.

The testator provides that, at the death of the widow, his estate shall be equally divided, and five portions paid as therein directed, and then further provides that in case of the death of either "before having received the portion *above devised to them*," leaving issue, etc. To my mind this language imports a present gift, and brings the case within the principle established in the case of *Manice v. Manice* (43 *N. Y.*, 369). It was also there held that the rule applied to a mixed fund of realty and personalty, citing *Martin v. Martin* (*L. R.*, 2 *Eq. Cas.*, 404). Besides, this is the residuary estate which is disposed of by the clause of the will under consideration, and to postpone its vesting, a clear intention must be indicated (2 *Jarm.*, 469, 472). The case of *Manice v. Manice* (*supra*) was essentially like this. Shares of proceeds of real and personal estate were given, at the death of the life tenant, to children and their issue, and if no issue, to survivors. The court, on this state of facts, says: "It may be laid down, as a general rule, that where, by a will, shares or interests in real or personal estate, to be ascertained by a division, are given, or where real estate is directed to be sold, and the proceeds to be divided, the estate or interest of the devisee or legatee, in the property to be divided or converted, is a vested interest before the conversion or division, and that limitations over, to take effect in case of the death of those first designated, prior to the division or sale, must be held to refer to the time appointed for the

division or sale." This seems to be as nearly in point as any case can well be. None can be expected to be precisely so, because of the varying provisions and phraseology of wills.

It has been said that, where legacies are payable at a future time, and there is a provision that, in case of the death of one legatee before it is payable, his legacy shall go to the survivors, the legacy does not vest. The above case is an authority to the contrary, and many more may be found in 2 Jarm. (5th ed.), 409, *n*. That was a ruling of the ecclesiastical courts, which has met but little favor in England or in this country. No sufficient reason is apparent for such a rule.

If it should be held that the legacies were contingent, then it would follow that it was the intention of the testator, if his grandson, Hull, died before the death of his widow, to abandon the claim of \$2,000 which he had against him, and so, in effect, give to his issue that amount, in addition to their equal share of the residuum of his estate. He could not be said to have contemplated, or intended, such a result.

The death of the wife was not a contingency; it was a certainty. Had the fact of the postponement of the sale of the house and lot been the only element considered in the case of *Shipman v. Rollins* (*supra*), it is believed a different conclusion would have been there reached. The question is not free from doubt, but here the legacies are considered as having vested at the death of the testator, subject to being divested on the death of any legatee without issue, before the period fixed for division, and the

time of possession, alone, postponed. If this view be correct, as it is believed to be, it follows that the judgment against William R. Hull, the deceased grandson, may be applied in payment of the share to which his issue are entitled.

As to the *second* question, it may be stated that the intention of the testator is, in every instance, to be ascertained from the language of the will, as is abundantly exemplified in the cases above considered. Of course, this language will determine his intention as to the period of time to which the term "survivor," is to be referred. It is well settled, as in the case of *Moore v. Lyons*, that survivorship should, in all cases, if there be no intent manifested to the contrary, be referred to the time of the death of the testator. Such special intent to the contrary was here manifested, by the testator. He directs his executors to sell and convert into money all his personal and real estate, except his residence and the furniture therein, and to invest the same for the benefit of his wife for life, save some few general legacies ; and she was to have the use of the homestead and furniture also, during her life. After the death of his wife, he directs the homestead and furniture to be sold, and the proceeds thereof, together with the principal of the fund producing her income, to be equally divided into five equal portions, and paid over as directed by the will. In case of the death of certain named children and grandson, *before having received* the portion given, leaving issue, such issue to take the share of the parent. "In the event of any or either of my said children or my grandson *thus dying* without leaving

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issue them surviving, I order and direct that the portion to which he or she would have been entitled, be divided equally among the survivors of them, share and share alike." This language clearly shows that it was the intention of the testator that the word "survivors" shall relate to the period of distribution fixed by the will, to wit, the death of the widow. That was the time assigned for each one to come into possession of his or her share. The case of Mahan (98 *N. Y.*, 372), cited as an authority on this point by the special guardian, and the cases there referred to, are therefore, not in point. All having died before the death of the widow, except Mrs. Jennings, she will, as sole survivor, take the share of Rebecca S. Ireland, who died, anterior to the death of the widow, leaving no issue.

It seems equally clear, on the *third* question, that the children of the deceased daughter, Mrs. Bowne, have no interest in the estate, beyond the legacy of \$1,000 bequeathed to them by the fifth clause of the will, and their one fifth of the residue. They are not named or referred to in the *sixth* clause in any way to entitle them to take as survivors. In so far as they are concerned, the case of Guernsey v. Guernsey (36 *N. Y.*, 267) is a conclusive authority, if any were needed, against the claim they advance to be classed among the survivors of the legatee who died without issue. The will declares that, in case of the death of any or either of testator's said children, Robert Alexander Barry, Rebecca Shinn Ireland, Elizabeth Ann Jennings or his grandson, William Robert Hall, before having received the portion bequeathed to them, and

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leaving issue, the share of the parent, so dying, to go to the issue. In case of there being no issue of those just named who might *thus* die, namely, before having received his or her share, the survivors of those named, and none others, were to take the share. Hence, the children of Mrs. Bowne have no interest in the share allotted to Mrs. Ireland.

Decree accordingly.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,
SURROGATE.—August, 1887.

MERRITT'S WILL.

*In the matter of the probate of the will of ANNIE
P. MERRITT, deceased.*

A citation, to an infant under fourteen, residing in another State, should be directed to be served personally at least thirty days before the return day, or by publication. A proposal to cause the party and his guardian to be brought into this State, in order to effect a shorter service, will not be approved.

THE petition, presented with a view to obtain a citation requiring the proper persons to attend the probate of the will of decedent, stated the jurisdictional facts, and also the names and places of residence of the heirs at law and next of kin. One of these was a minor, under fourteen years of age, residing with its father at Greenwich, in the state of Connecticut. The others were of full age, residing in Westchester county.

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It was asked, on behalf of the petitioner, that a citation, returnable within fourteen days, be issued; he suggesting that he would procure the father to bring the minor within the county, when the citation should be served upon them, at least eight days before the return day thereof.

A. C. BROWN, *for petitioner.*

THE SURROGATE.—The petition very properly stated the ages and places of residence of the parties. This is essential, in order that the court may fix the return day of the citation. If the petition had not stated such facts, an affidavit on the subject would have been required (Code Civ. Pro., § 2518; Redf. Surr. Pr. [3d ed.], 149). If it appear that all of the persons to be cited reside in the county of the Surrogate or an adjoining county, a return day will be fixed so that the same may be served at least eight days prior thereto; if in any other county of the State, so that the service may be made at least fifteen days before the return day; and if out of the State, such a return day must be fixed as to enable personal service thereof at least thirty days before the return day, or a return day fixed at least six weeks in advance, in order that service may be made by publication, etc. Although perhaps not strictly necessary, an order for the issuing of the citation is usually entered, but an order should be entered where the service is to be made by publication. The only guide the Surrogate has, by which to fix the return day, is the place of residence stated in the petition. Hence, if the resi-

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dence is stated to be in another State, the only proper course would seem to be to make the order for personal service thirty days before the return day, or by publication.

It would appear to be irregular, in fixing a return day, to be influenced by a promise to bring the party within the county in order that a service of eight days might be effected. Section 2520 of the Code provides how service, within the State, shall be made. "A citation shall be so served, if within the county of the Surrogate, or an adjoining county, eight days," etc. This, I take it, means where the petition shows the residence to be in the county of the Surrogate or an adjoining county. The non-resident is entitled to the length of time which the statute awards him, although he be served while passing through the county. A minor can waive no rights, and it would seem improper, if not illegal to bring it into the county to subject it to process. Of course, adults, wherever their residence may be, may waive legal service, or may volunteer an appearance, so as to confer jurisdiction. Minors cannot.

Application denied.

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ABATEMENT.

See INTERVENTION OF PARTIES ; PROBATE OF WILL, 1.

ACCOUNT.

See ALLOWANCE, 2.

ACCOUNTING.

1. Upon the return of a citation issued, in a special proceeding instituted under Code Civ. Pro., § 2606, as amended in 1884, by a legatee under a will, to compel the personal representative of a deceased executor thereof to account, with a view to payment of his legacy, the respondent cannot present a petition, under id., § 2726, for a judicial settlement of his account, and a citation to all persons interested in the estate of the first decedent to attend the same. *Crawford v. Crawford*, 37.
2. Where two co-executors, who differed respecting matters appertaining to the execution of their trust, which might have been satisfactorily presented in one proceeding, filed separate accounts of their transactions, each of which was contested and referred, with substantially the same results that would have been accomplished, had the controversy arisen in respect of the account first filed,—*Held*, that neither executor, nor any of the other parties, could recover costs or counsel fees out of the estate in both proceedings. *Matter of Weeks*, 194.
3. A petition presented, under Code Civ. Pro., § 2717, by an alleged creditor of a decedent, praying for an accounting by the executor, and the payment of petitioner's claim, may, where eighteen months have expired since the issuance of letters testamentary, be granted so far as to require an accounting, though subject to dismissal as to the payment by reason of a dispute with respect to the validity of the demand. *Matter of Cowdrey*, 453.

See ADMINISTRATOR WITH WILL ANNEXED, 1 ; DISPUTED CLAIM, 1 ;
EXECUTORS AND ADMINISTRATORS, 3 ; VOUCHERS, 1.

ACCUMULATION.

Where, upon an accounting by testamentary trustees, it appears that they have on hand surplus income of a fund, held by them for the satisfaction of annuities and other charges under the will of their testator, they cannot be directed, against the objection of those entitled to the resi-

due, to hold such surplus in order to meet the possible future demands of those annuities and charges, as this would be to sanction an unlawful accumulation. *Matter of Tilden*, 230.

ADEMPTION OF LEGACY.

See DONATIO INTER VIVOS, 1.

ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS ; LETTERS OF ADMINISTRATION ;
TEMPORARY ADMINISTRATOR.

ADMINISTRATOR WITH WILL ANNEXED.

1. An administrator with a will annexed, appointed upon the death of the sole surviving executor, is not within the purview of Code Civ. Pro., § 2724, in so far as that section restricts the power of a Surrogate, to permit or compel an accounting by an executor or administrator, to cases where one year has elapsed since letters were issued to him. *Matter of Burling*, 47.
2. The selection of an administrator, *c. t. a.*, *d. b. n.*, is to be made with reference to the portion of the decedent's estate left unadministered. *Matter of Beakes*, 128.
3. Testator, by his will, after bequeathing several legacies, directed the executors to convert the rest of the estate into money, and divide it into four equal parts, one of which he gave to them in trust for the benefit of successive life tenants ; with remainders over. The first life tenant having died, and the office of executor being vacant, the occasion arose for the appointment of an administrator, *c. t. a.*, to execute the trust.—*Held*, that all the persons immediately and ultimately interested in the fund were to be classed together as "principal or specific legatees," within the meaning of Code Civ. Pro., § 2643, subd. 2, and that the Surrogate had a discretion to select from their number, having regard to the nature of their respective interests. *Id.*
4. The will of testatrix named no executor, and no residuary legatee. The subscribing witnesses, however, testified to declarations, made by testatrix, of a wish that C., one of the principal legatees, and one of two rival applicants for letters of administration, *c. t. a.*, should be entrusted with the enforcement of the provisions of the will.—*Held*, that, *ceteris paribus*, the preference so expressed was entitled to weight in making the selection, and that C. should be appointed. *Matter of Powell*, 281.
5. A relative of a decedent, who is also a resident of this State, will be preferred, as an applicant for letters of administration, *c. t. a.*, of her estate, to a non-resident stranger in blood. *Id.*

6. Where a testator's residuary estate is held in trust, and occasion arises for the appointment of an administrator with the will annexed, the beneficiary of the trust is entitled to letters in preference to the trustee. *Matter of Roux*, 523.

ALLOWANCE.

1. The *per diem* allowance, authorized by Code Civ. Pro., § 2562, for preparing for trial, cannot be lawfully made except to a party accounting, and can be properly made to such a party only in so far as the labor of preparation is demanded by the best interests of the estate concerned. *Matter of Weeks*, 194.
2. The *per diem* allowance which, under Code Civ. Pro., § 2562, the Surrogate may award to an executor or administrator, for counsel fees in preparing his account, is not intended to compensate the accounting party for his personal services in such preparation, but is to enable him to secure legal assistance and advice when needed for putting the account into proper form. *Matter of Peyser*, 244.
3. A *per diem* allowance, for time occupied in preparing for trial, is permissible only in respect of accounting proceedings, as specified in Code Civ. Pro., § 2562. *Matter of Aaron*, 362.

See ATTORNEYS AND COUNSELLORS, 4.

AMENDMENT.

See JURISDICTION, 2.

ANCILLARY LETTERS.

A domiciliary administrator of the estate of a decedent who died a resident of another state, leaving personal property in New York, having applied here for ancillary letters,—*Held*, that, in view of applications then pending, in behalf of relatives of decedent, for original letters, the petition of the foreign representative might be denied, in the discretion of the court. *Matter of Williams*, 292.

See OFFICIAL BOND, 1.

ANNUITY.

An annuity, or a provision in the nature of an annuity, for the payment of which resort may be had to the income of a fund, but which is not directed to be discharged from such income exclusively, is an alienable interest, and a charge upon both income and corpus. *Matter of Tilford*, 524.

See ACCUMULATION ; OBJECTION ; WILL, 9.

ANSWER.

In response to a petition for a decree directing payment of an instalment of a legacy, amounting to \$500, after the same had become payable by the

terms of the will, the executor filed an answer setting forth, upon information and belief, that petitioner had unlawfully come into possession of four bonds, of the value of \$4,000, *formerly belonging* to decedent, of which respondent was entitled to the possession as executor, and had unlawfully converted the same, and refused to transfer them, or to pay their value; and that an action was pending between the parties "for the recovery of said bonds or their value."—*Held*, that the answer was insufficient as a defence, under Code Civ. Pro., § 2718, subd. 1. *Matter of Selling*, 225.

APPEAL.

1. Further time to serve a case on appeal cannot be granted, after the period within which such service may be made has fully elapsed. *De Lama-ter v. Havens*, 53.
2. The authority of an administrator with the will of a decedent annexed is, under Code Civ. Pro., § 2582, *ipso facto* suspended by an appeal from the decree granting his letters, and so remains unless the Surrogate by order confers upon him the limited powers in that section specified. *Matter of Place*, 228.

APPEARANCE.

A petition presented under Code Civ. Pro., §§ 2726, 2808, in behalf of an infant, praying for the judicial settlement of the account of an executor, trustee, cannot be dismissed because of petitioner's failure to appear by general or special guardian. If respondent, on return of the citation, petitions for a settlement of his account, a special guardian cannot be appointed in the original proceeding; otherwise such an appointment is proper at a later stage of the cause. *Matter of Wood*, 345.

APPORTIONMENT OF COMMISSIONS.

Testator, at the time of the execution of his will, and at his death, was the owner of a large estate, of which his personal property formed a trivial and insignificant portion. He appointed four executors, to each of whom, or such as might serve, he gave "the sum of \$1,200 annually, in lieu of all commissions or compensation allowed by law." By seventeen distinct provisions, certain parcels of realty were devised to the executors upon trust, to collect the rents, etc., and pay the same to specified beneficiaries during life, after proper deductions for taxes, and other charges, with respective remainders over. The will, however, in no instance, designated the executors as "trustees."—*Held*, that, 1. In construing the provision for a salary to the executors, the court might inquire into the character and amount of the testator's estate, both at the time of execution of his will, and at the time of his death. 2. It appearing that the personal property would be little more than adequate for the payment of the fixed salary for a single year, while the will imposed upon the executors onerous and delicate duties in hand-

ling the real property and distributing its rents and profits, such salary must be deemed to have been intended as a reward for all services at any time rendered in connection with the entire estate. 3. It being impossible to fix upon any just and fair basis of apportionment of the salaries, as between the real estate and the personalty, and as between the life devisees and the remaindermen, the provision for executorial compensation must fail because of its vagueness and uncertainty. *Matter of Weeks*, 194.

See COMMISSIONS, 7, 9.

APPORTIONMENT OF RENTS.

The purpose of the act, L. 1875, ch. 542—declaring that certain rents, annuities, dividends and other payments shall be apportioned so that on the death of any person interested therein, or on the determination by any other means whatever, of his interest, he or his executors, etc., shall be entitled to a proportion therein specified—as regards property devised, was to provide, not for the apportionment of rents as between those entitled to the testator's personal estate and the devisees of his real property, but for such apportionment as between successive takers of the realty. *Matter of Weeks*, 194.

APPRAISAL.

See COLLATERAL TAX, 7.

APPRAISER.

See COLLATERAL TAX, 1, 4.

ASSETS.

1. The disposition of moneys paid, at a decedent's death, by benefit associations whereof he was a member, is governed by the regulations of those associations, such moneys not constituting assets of his estate. *Matter of Brooks*, 326.
2. A policy of insurance upon the life of a decedent, who at the time of his death was not a resident of the State, issued by a domestic corporation having its principal office in New York county, is an asset which, under Code Civ. Pro., § 2478, confers jurisdiction upon the Surrogate's court of that county to grant letters of administration of the estate, though the instrument is without the State at the time of the application. *Matter of Miller*, 381.

See JURISDICTION, 5.

ATTESTATION.

See JURISDICTION, 10.

ATTORNEYS AND COUNSELLORS.

1. The provision of General Rule 2, that "all papers served or filed must be indorsed or subscribed with the name of the attorney or attorneys, and his or their office address, or place of business," is sufficiently complied with, in the case of a notice of entry of a decree, where the name of the attorney subscribed to the notice is followed by the designation of a locality which is in fact his office, although not in terms described as such, or as his "place of business." *De Lamater v. Havens*, 53.
2. Where the committee of the property of a lunatic employs an attorney to perform professional services in a matter pertaining to his trust, the remedy of the latter, for his compensation, is against the committee, personally, and not against the fund which he represents. *Kowing v. Moran*, 56.
3. A beneficiary under decedent's will having, by his attorney, instituted a special proceeding to compel the executors to account, with a view to securing his interest in the estate, entered into an agreement in writing with such attorney to pay the latter, in consideration for his services one half the amount for which the party's interest might be compromised or settled, giving the attorney a lien on said sum, and stipulating not to compromise his claim without the attorney's knowledge. The will conferred upon the executors a power to sell decedent's real property.—*Held*, 1. That such agreement was valid and binding upon the party. 2. That none of the real property unsold by the executors, under the testamentary power, could be included in estimating the value of the party's interest,—the executors not being bound to account therefor. *Matter of Fernbacher*, 219.
4. Where the daughter and sole next of kin of a decedent, her father, while engaged in contesting his will, which constituted her a *cestui que trust* with an interest less than would belong to her in case the will were refused probate, made application to the court for an allowance, *pendente lite*, out of the income of the estate for her support; which was opposed by her attorney, insisting upon the protection of his lien for services rendered in the cause,—*Held*, that such lien, if any existed, could attach only to the excess of contestant's interest in case intestacy were decreed, over that passing to her under the will if sustained, and so furnished no reason for refusing to grant the application to an extent not exceeding the amount of the latter interest. *Matter of Hoyt*, 432.
5. Under 1 R. S., 730, § 63, enacting that "no person beneficially interested in a trust for the receipt of the rents and profits of lands can assign or in any manner dispose of such interest," extended by the decisions to a trust of personalty,—an attorney for a beneficiary of such a trust, created by will, employed to contest the probate thereof, cannot, by virtue of his retainer, secure, pending the contest, a lien upon income, the disposition of which, for the contestant's benefit, the Surrogate has power to direct. *Id.*
6. As to whether an attorney for a party to a special proceeding in a Surro-

gate's court is entitled to the benefits of the provision of Code Civ. Pro., § 66, declaring that, "from the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim," etc.,—*quære*. *Matter of Hoyt*, 432.

See SUBSCRIBING WITNESS; SUBSTITUTION OF ATTORNEYS.

BANK DEPOSIT.

At the time of decedent's death, there was on deposit, in a savings bank, to the joint credit of himself and wife, a sum of over \$1,900, which the widow, after her appointment as administratrix, withdrew from the bank, and one half of which, less \$150 set apart for her benefit, was included in an inventory of decedent's property.—*Held*, that an exception to a finding that the amount of the deposit was the joint property of decedent's estate and his widow, and that, in the absence of evidence as to the respective proportions, the latter was accountable as administratrix, for only one half thereof, should be overruled. *Matter of Brooks*, 326.

See DISCOVERY OF ASSETS, 4; PREFERRED CREDITOR.

BENEFIT ASSOCIATION.

See ASSETS, 1; FUNERAL EXPENSES, 2.

BENEVOLENT SOCIETIES.

See CHARITABLE BEQUESTS.

BEQUEST.

See CHARITABLE BEQUESTS; LEGACY.

BURDEN OF PROOF.

See VOUCHERS, 2.

CASE ON APPEAL.

See APPEAL, 1; FINDINGS.

CASES ADHERED TO, APPROVED, COMPARED, DISAPPROVED, DISTINGUISHED, FOLLOWED.

- Barry v. Lambert*, 98 N. Y., 300—distinguished. *Matter of Dunn*, 124.
Coope v. Lowerre, 1 Barb. Ch., 45—approved and followed. *Matter of Cutting*, 456.
Griffin v. Ford, 1 Bosw., 123—compared. *Matter of Tilford*, 524.
Hunter v. Hunter, 17 Barb., 25—compared. *Matter of Tilford*, 524.
Jackson v. Twenty-third St. R. R. Co., 88 N. Y., 520—distinguished. *Matter of Townsend*, 147.

- King v. Talbot, 40 N. Y., 76—compared. *Matter of Cant*, 269.
- Laytin v. Davidson, 95 N. Y., 263—distinguished. *Matter of Townsend*, 147.
- Lyons v. Mahan, 1 Dem., 180—distinguished. *Matter of Marshall*, 357.
- Manice v. Manice, 43 N. Y., 369—compared. *Jennings v. Barry*, 531.
- Matter of Cogswell*, 4 Dem., 248—distinguished. *Matter of Lefever*, 184.
- Matter of Dodge*, 24 Week. Dig., 3—followed. *Matter of Hoyt*, 284.
- Matter of Eddy*, 10 Abb. N. C., 396—disapproved. *Matter of Weeks*, 104.
- Matter of Gerard*, 1 Dem., 244—distinguished. *Matter of Fogg*, 422.
- Matter of Gray*, 42 Hun, 411—distinguished. *Matter of Potter*, 108.
- Matter of Mahan*, 98 N. Y., 372—distinguished. *Jennings v. Barry*, 531.
- Matter of Thompson*, 28 How. Pr., 581—followed. *Matter of Roux*, 523.
- Metzger v. Metzger, 1 Bradf., 265—compared. *Orser v. Orser*, 21.
- Monarque v. Monarque, 80 N. Y., 320—distinguished. *Matter of Russell*, 388.
- Moore v. Hegeman, 72 N. Y., 376—distinguished. *Matter of Russell*, 388.
- Popham v. Spencer, 4 Redf., 401—adhered to. *Crawford v. Crawford*, 37.
- Rauchfuss v. Rauchfuss, 2 Dem., 271—distinguished. *Matter of Marshall*, 357.
- Roosevelt v. Roosevelt, 5 Redf., 264—distinguished. *Trust Co. v. Hall*, 73.
- Russell v. Hartt, 87 N. Y., 9—followed. *Matter of Delaplaine*, 398.
- Russell v. Russell, 36 N. Y., 581—distinguished. *Matter of Davids*, 14.
- Sisters of Charity v. Kelly, 67 N. Y., 409—compared. *Matter of Acker*, 19.
- Smith v. Meakim, 2 Dem., 129—disapproved. *Shute v. Shute*, 1.
- Spencer v. Popham, 5 Redf., 428—adhered to. *Crawford v. Crawford*, 37.
- Wilmerding v. McKesson, 103 N. Y., 329—distinguished. *Matter of Hall*, 42.
- Young v. Young, 80 N. Y., 422—distinguished. *Matter of Townsend*, 147.

CESTUI QUE TRUST.

See TESTAMENTARY TRUST; TESTAMENTARY TRUSTEE; TRUST.

CHARITABLE BEQUESTS.

Under L. 1860, ch. 360, declaring that no person leaving a husband, wife, child or parent shall devise or bequeath to any benevolent, etc., society more than one half of his estate, after the payment of debts, the value of the whole estate owned by a testator at the time of his death is to be reckoned, including property of which the will expressly states that it omits to dispose. *Matter of Moderno*, 288.

CITATION.

See SALE OF REAL ESTATE, 3; SERVICE OF CITATION.

CODE OF CIVIL PROCEDURE.

• [Sections construed or cited.]

- § 66. *Matter of Hoyt*, 432.
- § 395. *Matter of Thompson*, 393.
- § 414. *Matter of Van Dyke*, 331.
- § 724. *Hood v. Hood*, 50.
- § 758. *Matter of Dunn*, 124.
- § 763. *Matter of Clark*, 377.
- § 779. *Matter of Lippincott*, 299.
- § 829. *Matter of Scheuer*, 369.
- § 829. *Matter of Musgrave*, 427.
- § 835. *Matter of Elston*, 154.
- §§ 870-886. *Matter of McCoskry*, 256.
- § 1282. *Hood v. Hood*, 50.
- § 1393. *Matter of Winans*, 138.
- § 1819. *Matter of Van Dyke*, 331.
- § 1819. *Matter of Thompson*, 393.
- §§ 1832-1834. *Matter of Woodworth*, 156.
- § 1861. *Matter of Delaplaine*, 398.
- § 1868. *Matter of Gall*, 374.
- § 2236. *Matter of Battle*, 447.
- § 2348, subd. 3. *Matter of Henry*, 272.
- § 2472. *Cocks v. Haviland*, 11.
- § 2476. *Matter of Hopper*, 242.
- § 2478. *Matter of Hopper*.
- § 2478. *Matter of Miller*, 381.
- § 2481, subd. 6. *Matter of Tilden*, 230.
- § 2481, subd. 11. *Kowing v. Moran*, 56.
- § 2520. *Merritt's Will*, 544.
- § 2539. *Matter of McCoskry*, 256.
- § 2545. *Matter of Hoyt*, 284.
- § 2547. *Matter of McGovern*, 424.
- § 2552. *Matter of Battle*, 447.
- § 2555. *Matter of Battle*, 447.
- § 2556. *Matter of Lippincott*, 299.
- § 2557. *Matter of Henry*, 272.
- § 2561. *Delamater v. McCaskie*, 8.
- § 2562. *Matter of Weeks*, 194.
- § 2562. *Matter of Peyser*, 244.

- § 2562. *Matter of Aaron*, 362.
- § 2582. *Matter of Place*, 228.
- § 2602. *Chambers v. Cruikshank*, 414.
- § 2606. *Matter of Fithian*, 305.
- § 2606. *Matter of Van Dyke*, 831.
- § 2611. *Matter of McMulkin*, 295.
- § 2611. *Matter of Delaplaine*, 398.
- § 2618. *Matter of McGovern*, 424.
- § 2621. *Matter of Delaplaine*, 398.
- § 2624. *Matter of Thompson*, 117.
- § 2624. *Matter of Moderno*, 288.
- § 2635. *Matter of Delaplaine*, 398.
- § 2636. *Matter of Sears*, 497.
- § 2639. *Matter of Beakes*, 128.
- § 2643. *Matter of Powell*, 281.
- § 2643. *Matter of Roux*, 523.
- § 2643, subd. 2. *Matter of Beakes*, 128.
- § 2662. *Matter of Williams*, 292.
- § 2668, subd. 1. *Matter of Eisner*, 888.
- § 2672. *Matter of Fleming*, 836.
- § 2672. *Matter of Aaron*, 362.
- § 2685. *Matter of Brewster*, 259.
- § 2685. *Matter of Petrie*, 352.
- § 2694. *Matter of McMulkin*, 295.
- § 2697. *Matter of Williams*, 292.
- § 2699. *Matter of Musgrave*, 427.
- § 2706. *Matter of Knittel*, 371.
- § 2713. *Delamater v. McCaskie*, 8.
- § 2717. *Matter of Conway*, 290.
- § 2717. *Matter of Cowdrey*, 453.
- § 2718. *Matter of Cowdrey*, 453.
- § 2718, subd. 1. *Matter of Selling*, 225.
- § 2719. *Matter of Selling*, 225.
- § 2724. *Matter of Burling*, 47.
- § 2726. *Matter of Wood*, 345.
- § 2728. *Crawford v. Crawford*, 37.
- § 2729. *Matter of Wood*, 345.
- § 2734. *Orser v. Orser*, 21.
- § 2734. *Matter of Rowland*, 216.
- § 2736. *Hawley v. Singer*, 82.

- § 2736. *Smith v. Buchanan*, 169.
- § 2736. *Matter of Dunkel*, 188.
- § 2737. *Matter of Weeks*, 194.
- § 2739. *Matter of Eisner*, 368.
- § 2749. *Matter of Davids*, 14.
- § 2750. *Matter of Rosenfield*, 251.
- § 2754. *Matter of Davids*, 14.
- § 2756. *Matter of Rosenfield*, 251.
- § 2759. *Matter of Rosenfield*, 251.
- § 2793, subd. 5. *Shute v. Shute*, 1.
- § 2792, subd. 5. *Cook v. Woodard*, 97.
- § 2793, subd. 7. *Cook v. Woodard*, 97.
- § 2808. *Matter of Wood*, 345.
- § 2815. *Matter of Sears*, 497.
- § 2816. *Matter of Wood*, 345.
- § 2871. *Matter of Petrie*, 352.

CODICIL.

See EXECUTION OF WILL.

COLLATERAL TAX.

1. Under L. 1885, ch. 483, entitled "an act to tax gifts, legacies and collateral inheritances in certain cases," it is only necessary to appoint an appraiser where specific legacies, subject to tax, are given, or where taxable inheritances exist, or estates in fee are devised, or remainders, annuities, life estates, or terms of years are created. *Matter of Jones*, 30.
2. The phrase, "lineal descendants," in the exemption clause of § 1, includes only those of the decedent. *Id.*
3. The requirement of § 13, that an appraiser be appointed "to fix the value of property of persons whose estates shall be subject to the payment of said tax," has reference to the *estates of persons taking*, as legatees or otherwise, and not to the estate of the decedent. *Id.*
4. Testator, who died leaving real and personal property, by his will directed the former to be sold, and disposed of the entire estate, in general legacies, without remainders, to descendants of deceased brothers and sisters, and to strangers in blood. The district attorney having applied (1) for the appointment of an appraiser to fix the value of the estate, and (2) for a citation, to all persons interested, to show cause why the tax imposed by L. 1885, ch. 483, should not be paid,—*Held*, (1) that no appraisal was required; (2) that the issue of the citation asked for was not provided for by the statute; and (3) that each application should be denied. *Id.*

5. *It seems*, that the only mode which the Surrogate can employ, to enforce the liability of an executor or administrator to pay the tax imposed by the act in question, is to refuse to allow him credit, on his accounting, for the amount of such liability, unless he produce the voucher therein mentioned. *Id.*
6. Under L. 1885, ch. 483, imposing a tax upon property passing by will, intestacy, or transfer taking effect after the death of the transferor, to a person other than "father, mother, husband, wife, children, brother and sister and lineal descendants born in lawful wedlock," etc., the exemption of *descendants* extends only to those who occupy that relation towards the testator, intestate, or person making the transfer described. *Matter of Smith*, 90.
7. The design of the proviso, in the first section of that act, "that an estate which may be valued at a less sum than five hundred dollars shall not be subject to said tax or duty," is to exempt small legacies, etc., from the imposition,—the *estate* specified being that of the taker, and not that of the testator, intestate, or transferor. *Id.*
8. In appraisals made under L. 1885, ch. 483, entitled "an act to tax gifts, legacies and collateral inheritances in certain cases," the value of a life estate is to be ascertained by reference to the tables of mortality adopted by the General Rules of Practice. *Matter of Robertson*, 92.
9. Property within the State, passing by the will of one who died a resident of another State, to persons not within the classes exempted by L. 1885, ch. 483, entitled "An act to tax gifts, legacies and inheritances in certain cases," is subject to the tax thereby imposed. *Matter of Enston*, 93.
10. Legacies to descendants of brothers or sisters of a testator are taxable under the collateral inheritance tax act, L. 1885, ch. 483. *Matter of Miller*, 132.
11. So are legacies, to persons not exempt, of less than five hundred dollars;—the proviso "that an estate which may be valued at a less sum than five hundred dollars shall not be subject to said duty or tax," referring to the estate of the decedent, and not to the interest of a legatee or other taker. *Id.*
12. In determining what "societies, corporations and institutions" are "exempted by law from taxation," within the meaning of the act cited, the rule, that statutes of exemption are to be strictly construed, does not require that only such societies be deemed exempt as are declared so to be by their charters; it is enough if the society claiming the immunity belong to a class exempted by general statute. *Id.*
13. L. 1885, ch. 483, entitled "an act to tax gifts, legacies and collateral inheritances in certain cases," does not contravene the constitution of the State, by reason of its conferring upon Surrogates powers unauthorized by that instrument, or omitting to require proper notice to be given to the persons to be taxed, or falling to state the object to which the tax is to be applied. *Matter of McPherson*, 166.

14. Under L. 1885, ch. 483, entitled "An act to tax gifts, legacies and collateral inheritances in certain cases," property is not taxable unless and until it "passes" in the manner therein described. Hence, a contingent remainder, bestowed by will upon one not in a class exempted by the act mentioned, is not to be appraised or taxed, until the defeating contingency has been rendered forever impossible of occurrence. *Matter of Lefever*, 184.
15. As to whether the statute, L. 1885, ch. 483, entitled "an act to tax gifts, legacies and collateral inheritances in certain cases," commenced and took effect on the day of its passage, or on the twentieth day thereafter—*quære*. *Matter of Chardaroyne*, 466.
16. The opening clause of the first section of the act cited, viz. : "after the passage of this act," is grammatically related to the word "pass" or "die," in that section occurring ; and is operative to subject to taxation property passing, in the manner specified, to one not exempt, from an owner dying after June 10th, 1885. *Id.*
17. L. 1885, ch. 483, entitled "An act to tax gifts, legacies and collateral inheritances in certain cases," is to be properly regarded as imposing a tax upon the devolution of and succession to a decedent's property, and not upon the property itself. *Matter of Howard*, 483.
18. The will of testatrix directed the executors thereof, as soon as convenient after death, to sell for cash all bonds which she should own at the time of her death, collect all moneys due, and divide and pay, out of the proceeds of sale and other funds, certain pecuniary legacies. No allusion was made to the possession of United States bonds, although a portion of the estate consisted of such securities. The executors, upon their accounting, having asked credit for a payment of moneys made to the comptroller under L. 1885, ch. 483, certain legatees objected and asked to be relieved from the burden imposed upon them so far as concerned the value of the bonds in question, upon the ground that the same were exempt from taxation.—*Held*, that the tax imposed and paid was not upon property but upon the *passing* thereof ; that the fact that a portion thereof consisted of government securities was immaterial ; and that the objection must be overruled. *Id.*

COLLECTION OF DEBT.

Executors who surrender to the government U. S. bonds, called by the latter, being assets of their decedent's estate, cannot be held thereby to collect a debt, within the meaning of a provision in the will allowing them five per cent. on all sums received from the "collection of debts owing" to the decedent. *Matter of Tilden*, 230.

COMMISSIONS.

1. A judgment of the Supreme court, rendered in an action brought to determine whether an executor was bound to sell corporate stock, in the course of administration, or deliver it to legatees,—under the provis-

ions of a will which ordered the executor not to sell the stock, but to deliver a certain number of shares to each legatee,—directed that the stock should pass to the legatees specifically and be delivered to them in specie.—*Held*, that this was not an adjudication that the bequests of stock were specific, in such a sense as to deprive the executor of commissions upon the value thereof. *Hawley v. Singer*, 82.

2. The amount of commissions of a general guardian of an infant's property, under Code Civ. Pro., § 2736—determined. *Id.*
3. Testator, by his will, gave the residue of his real and personal property to his executors, in trust to sell the former, and divide the proceeds of the entire residue into thirty-two equal parts; whereof he directed the executors to invest, in their names as trustees, five for the benefit of his daughter, M., eight for that of his daughter, B., and nineteen for that of his daughter, C., during their respective natural lives, and, at the death of each of his said daughters, to pay the principal invested for her benefit to her descendants. He appointed C. and two others "executors of this my will, and trustees of the several trusts hereinbefore created," and provided in case "any of said trustees" should die or become disqualified, for the appointment of a successor.—*Held*, that the executors were not entitled to double commissions. *Matter of Townsend*, 147.
4. Proceeds of the sale of a decedent's real property, made by the executors pursuant to valid directions contained in the will, are to be reckoned as part of the personal estate, for the purpose of an allowance of commissions under Code Civ. Pro., § 2736, according to which, where the personal estate of a decedent amounts to \$100,000, or over, above all debts, three full commissions are distributable among three or more executors, according to the services rendered by them, respectively. *Smith v. Buchanan*, 169.
5. The statute enlarging the commissions of executors, etc., in case of the estates described, was based upon the theory that such an estate could afford to suitably reward a faithful trustee for its administration, and that the rate previously allowed was too small to compensate him for the labor and responsibility involved. *Id.*
6. Testator died, leaving an estate, which comprised both real and personal property, amounting to more than \$100,000, over all his debts, and a will appointing three executors, who qualified and acted, and to whom the residue, after certain specific dispositions, was given in trust to convert into money, hold and invest sufficient of the proceeds to provide for the payment of annuities, and ultimately to divide the entire principal among testator's children. The right to three full commissions, claimed by the executors upon their accounting, had after the death of the annuitants, depended upon whether the proceeds of realty disposed of by the former were to be considered, for this purpose, personal estate. Most of the parcels of such property had been conveyed, at agreed valuations, to the children, by the executors, who took receipts for the purchase price, and applied the amounts upon the dis-

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tributive shares of the grantees.—*Held*, that, under the will, the real property was to be converted into personalty, and distributed to the children as such; and that the executors were entitled to three full commissions, to be awarded in proportions which appeared to have been fairly earned. *Id.*

7. The authority possessed by a Surrogate's court, to apportion commissions among co-executors, carries with it, incidentally, power to enforce payment of a sum awarded in such behalf, in like manner as any other moneys decreed to be paid. *Matter of Dunkel*, 188.
8. *It seems* that the responsibility of his position, alone, entitles one of two or more co-executors to a share of the commissions, independently of the services rendered by him in the administration of his decedent's estate. *Id.*
9. One of the two co-executors of decedent's will, who were also legatees thereunder, having filed a petition praying for a judicial settlement of the account of himself, and associate, and an apportionment of commissions, the latter set up and proved that petitioner and the other beneficiaries had executed an instrument acknowledging the receipt of their respective shares, and consenting to the entry without notice, of an order discharging respondent from office as executor. The sum due for commissions had also been agreed upon, and the entire amount thereof retained by respondent, though the evidence showed no intent, on the part of petitioner, to waive his right to a ratable proportion.—*Held*, that the instrument in question did not affect petitioner's claim to a share of the commissions; that respondent could be compelled to account for the amount thereof, withheld by him, with interest, as for assets in his hands; and that the same should be apportioned between the executors according to the services rendered by them, respectively. *Id.*
10. Testator, by his will, which allowed to the executors, "on the proceeds of sale of real estate, one per cent. of the amount received," gave the residue of his estate, real and personal, to his children, in equal shares, authorizing his executors to execute all conveyances necessary to effect a division, or in order to sell and convert into money any part of his real estate. A division, *in specie*, of certain of the real estate having been made among the children, by deeds executed by the executors and others interested,—*Held*, that commissions on the proceeds of sale of real estate were not earned by the action of the executors, in such allotment and conveyance. *Matter of Tilden*, 230.
11. A disallowance of an item in a trustee's account, representing a sum retained by him as commissions, the retention whereof has been sanctioned by a decree entered upon a judicial settlement, cannot be effected by denying commissions on a subsequent accounting, in an amount equal to the alleged prior overpayment, nor until such decree has been opened and vacated. *Id.*

See APPORTIONMENT OF COMMISSIONS; INTEREST, 1; LEGACY, 1; POWER OF SALE, 1; TESTAMENTARY GUARDIAN.

COMMITTEE.

See ATTORNEYS AND COUNSELLORS, 2; SALE OF REAL ESTATE, 6.

CONSOLIDATION ACT.

See PUBLIC ADMINISTRATOR, 1.

CONSTITUTIONAL LAW.

A Surrogate's court should not declare a statute void as unconstitutional, unless satisfied of its invalidity upon that ground, beyond a reasonable doubt. *Matter of McPherson*, 166.

See COLLATERAL TAX, 18.

CONSTRUCTION OF STATUTE.

Words of a statute should not be treated as surplusage, if, upon any fair and reasonable construction, they are found to serve an intelligible purpose. *Matter of Chardavoyne*, 466.

See CHARITABLE BEQUESTS; COMMISSIONS, 5; CONSTITUTIONAL LAW; DISAGREEMENT OF EXECUTORS, 2; FOREIGN WILL, 3.

CONSTRUCTION OF WILL.

A decree, admitting a will to probate, may be opened, at the instance of a former contestant, to enable him to apply for a judicial construction of its provisions. *Matter of Keeler*, 218.

See JURISDICTION, 6; WILL, 5.

CONTEMPT.

1. Where a direction to an executor, to pay a specified sum to a person named, is contained in a decree admitting a will to probate, want of assets may be set up in answer to an application to punish for contempt for disobedience thereto. *Matter of Davidson*, 224.
2. Motion costs, awarded against an executor or administrator, cannot be collected by proceedings to punish as for contempt of court. The remedy is by execution, as prescribed by Code Civ. Pro., §§ 779, 2556. *Matter of Lippincott*, 299.
3. An application to a Surrogate's court, to imprison for contempt a party shown to have disobeyed its decree, made pursuant to Code Civ. Pro., § 2555, providing that a decree "may be enforced," in the cases therein specified, by punishing the delinquent for a contempt, is addressed to the discretion of the court. *Matter of Battle*, 447.
4. Notwithstanding the declaration of Code Civ. Pro., § 2552, that a decree directing payment of money by an executor is conclusive evidence of the possession of assets sufficient to satisfy the sum specified, the court may by virtue of the authority implied in id., § 2286, which permits the

discharge from imprisonment of one unable to perform the act or duty required, refuse to punish an executor for disobeying such a decree where it is shown that, in truth and fact, he has been, at all times since the entry thereof, utterly unable to comply with its directions. *Id.*

CONTINGENT REMAINDER.

See COLLATERAL TAX, 14.

CONVERSION.

See EXECUTORS AND ADMINISTRATORS, 7.

CORPORATION.

See COLLATERAL TAX, 12.

COSTS.

1. The costs included in a judgment recovered against an executor or administrator, upon a demand against the decedent, are not a preferred claim against the estate ; but the judgment must be dealt with in its entirety, and the creditor, in case of a deficiency of assets, receive a just proportion, estimated upon the whole amount for which the same was rendered. *Shute v. Shute*, 1.
2. An award of \$50, costs, against an unsuccessful respondent in a contested special proceeding instituted, under Code Civ. Pro., § 2706, *et seq.*, for the discovery of concealed assets, etc.,—*held* a reasonable exercise of the Surrogate's discretion (*id.*, § 2561). *De Lamater v. McCaskie*, 8.
3. The question whether costs, awarded in a probate proceeding, should be made payable by a party personally, or out of the decedent's estate, rests, under Code Civ. Pro., § 2557, in the sound discretion of the court. A defeated contestant should not be mulcted with proponent's costs, where his resistance may, from his standpoint, have seemed proper and necessary, in the interests of justice, and for the due protection of his rights. *Matter of Henry*, 272.
4. Accordingly, where a decree was about to be entered, denying a petition for the revocation of probate of a will, and it appeared that petitioner had been advised by counsel that it was competent, in the proceedings instituted by him, to inquire into the validity of a divorce and a subsequent marriage of proponent, which matters were excluded by the court from consideration,—but for which ruling, petitioner might have succeeded in establishing his *status* as a contestant, and in his opposition to confirmation of probate,—*Held*, that the costs awarded should be directed to be paid out of the funds of the estate. *Id.*
5. Costs, when allowed, must be awarded to parties and not to their counsel. *Matter of Aaron*, 362.

See ACCOUNTING, 2 ; CONTEMPT, 2 ; DISCOVERY OF ASSETS, 1 ; JURISDICTION, 7.

COUNSEL FEES.

An executor or administrator cannot get the judgment of the Surrogate upon a question of paying the bill of counsel for services rendered in the administration of the decedent's estate, but must rely upon his own convictions of propriety and legality, and await a reckoning upon the settlement of his account. *Matter of Cohn*, 338.

See EXPENSES OF ADMINISTRATION ; SALE OF REAL ESTATE, 2.

DEATH.

A final judgment entered, pursuant to Code Civ. Pro., § 763, against a party to an action, after his death, occurring subsequently to interlocutory judgment against him has, under 2 R. S., 87, § 27, subd. 3, when duly docketed, the same force and effect, as regards title to priority in payment, as if decedent had died on the day before its entry. *Matter of Clark*, 377.

See WILL, 4.

DECLARATIONS.

See EVIDENCE.

DECREE.

1. As to whether Code Civ. Pro., § 1282, relating to a motion to set aside a judgment for irregularity, is applicable to decrees of Surrogates' courts—*quære*. *Hood v. Hood*, 50.
2. After a decree of a Surrogate's court has been sustained on appeal by the Court of Appeals, a motion made in the former tribunal, to vacate such decree, on the ground of irregularity in its entry, *e. g.*, because no findings of fact and conclusions of law were filed, will be denied. A motion of such a character must, at any rate, be made within the year specified in Code Civ. Pro., § 724. *Id.*

See COMMISSIONS, 11 ; CONSTRUCTION OF WILL ; JURISDICTION, 2, 4 ; PARTIES, 2.

DEFENCE.

See CONTEMPT, 1, 4.

DEFINITIONS.

See ADMINISTRATOR WITH WILL ANNEXED, 3 ; COLLATERAL TAX, 2, 6 ; HEIRS, 1, 2 ; ISSUE ; LETTERS OF ADMINISTRATION, 2 ; PARAPHERNALIA.

DEVASTAVIT.

A., one of the next of kin of an intestate, and a distributee of her estate, received letters of administration thereof, in connection with B. as

co-administrator, but never received any of the funds except her distributive share, and never rendered an account, although, upon an accounting by B., she was allowed a certain sum by way of commissions. She had entire confidence in B., and in his financial condition, entrusted her own money to him for investment, and remained passive in respect of the administration. In the absence of evidence tending to show knowledge on her part that B. was using the trust funds for his own purposes,—*Held*, that she could not be made liable for his *devastavit*. *Matter of Gall*, 42.

DISAGREEMENT OF EXECUTORS.

1. The occasion for enforcing a joint custody of property, on the part of disagreeing executors, as permitted by Code Civ. Pro., § 2602, is properly deemed to have arisen, whenever the circumstances are such that joint custody pursuant to an agreement of the executors themselves would commend itself to the Surrogate as suitable and wise. *Chambers v. Cruikshank*, 414.
2. The purpose of the legislature, in enacting the section cited, was expressly to modify the rule of law, according to which each of two or more co-representatives is entitled, in an ordinary case, to collect the decedent's personal estate, and hold it in his own possession, apart from the control of his associates. *Id.*

See ACCOUNTING, 2.

DISCONTINUANCE.

- A Surrogate's court has authority, under Code Civ. Pro., § 2481, subd. 11, where a special proceeding has been instituted for the disposition of the real property, late of a decedent, for the payment of his debts, to order a discontinuance thereof, at the instance of the owner, upon payment, by the latter, of the claims established and the costs incurred. *Kowing v. Moran*, 56.

DISCOVERY OF ASSETS.

1. In Code Civ. Pro., § 2713, last sentence, requiring a special proceeding for the discovery of a decedent's assets to be dismissed upon the presentation of a proper bond, and the payment of costs, if any, awarded to petitioner, "*within such a time as the Surrogate or other officer fixes for that purpose*," the clause quoted relates solely to the payment of costs, the time for which cannot be fixed except upon presentation of such a bond. *DeLamater v McCaskie*, 8.
2. Code Civ. Pro., §§ 2706–2714 were designed to afford a simple and summary procedure whereby an executor or administrator might secure the surrender of *property, belonging to his decedent's estate*, discovered to be in the hands or under the control of one not lawfully entitled to the possession. *Matter of Knittel*, 371.
3. Those sections do not authorize the examination of a debtor of a decedent,

merely for the purpose of ascertaining the nature and extent of the debtor's liabilities to the estate. *Id.*

4. Hence, where an administratrix caused the president of a savings bank, in which a deposit had been made in trust for her decedent during her lifetime, to be cited to attend in court, and asked that he be examined, in order that petitioner might be fully advised as to said moneys and the detention thereof, and in order that she might obtain payment of the same,—*Held*, that money so deposited became at once the *property of the depositary*; and that the proceedings for examination should be dismissed. *Id.*

See COSTS, 2.

DISPOSITION OF REAL PROPERTY.

See SALE OF REAL ESTATE.

DISPUTED CLAIM.

1. A Surrogate's court has the same authority to determine a disputed claim by or against the accounting party, upon the settlement of the account of a temporary administrator, as upon that of an executor or administrator in chief. *Matter of Eisner*, 383.
2. This includes the competency to adjudicate upon a claim of a debt alleged to be due to the estate of the decedent, from the temporary administrator, and others jointly. *Id.*

See ACCOUNTING, 3; OFFICIAL BOND, 1; PAYMENT OF DEBTS, 5.

DISTRIBUTION OF ASSETS.

See INVESTMENTS, 1; STATUTE OF LIMITATIONS, 2.

DONATIO INTER VIVOS.

1. Testator died in September, 1885, aged 84 years, leaving a large estate, and leaving him surviving, three daughters, to one of whom, C., he gave, by his will, executed in 1883, besides certain absolute bequests, a life interest in more than two thirds of his property, with remainder to her children. Upon the judicial settlement of the account of the executors, it appeared that C. claimed certain personal property, consisting of a deposit in a trust company and railroad bonds, of the value of about \$120,000, as a gift from testator in his lifetime, which the other legatees contended belonged to the estate. The bonds were purchased by the testator, and, after being registered in C.'s name, were retained by him, and found, after his death, among his papers, he having regularly removed the coupons and collected the interest. The money, amounting to over \$100,000, was, except the last item of \$4,000, deposited in the trust company, at different dates, before the execution of his will, in C.'s name, by the testator, who gave to the company a slip containing the former's signature, to be pasted in the signa-

ture-book. C. kept the pass-book in her possession, but never drew against the deposit. There was evidence of declarations by testator that he wanted to create a fund for C.'s benefit. It was contended that the alleged gifts were void for want of delivery, and that, if sustained, they must be regarded as adeeming, *pro tanto*, the provisions in C.'s favor, contained in the will.—*Held*, that the gifts were valid, the control of, and title to the subject-matter having passed from testator to the donee; and that there was no ademption of the testamentary disposition. *Matter of Townsend*, 147.

2. Decedent, in pursuance of an ante-nuptial promise, but without other consideration, transferred a mortgage to his wife, by a written assignment, which provided that "the interest on said mortgage and the money thereby secured" were to belong to the assignor during his lifetime; and delivered to her the mortgage and assignment, retaining the bond in his own possession. Upon her accounting, as executrix, the widow claimed title to the mortgage as donee.—*Held*, that the transfer could only be sustained, if at all, as a gift *inter vivos*; and that it was invalid as such, by reason of the interest retained in the subject by decedent. *Matter of Wirt*, 179.

DOWER.

See INTEREST, 2.

EQUITABLE CONVERSION.

See COMMISSIONS, 6.

ESTOPPEL.

See WILL.

EVIDENCE.

One claiming to be decedent's widow and, as such, entitled to letters of administration of his estate, having moved for the revocation of such letters previously issued to others, and supported her application by her affidavit of personal transactions and communications between herself and decedent, respondents objected to the evidence as incompetent under Code Civ. Pro., § 829.—*Held*, that respondents had relieved petitioner from the disqualification contended for, by putting in evidence declarations of decedent denying the relationship upon which the application was based. *Matter of Scheuer*, 369.

See DONATIO INTER VIVOS; INVENTORY; TESTAMENTARY TRUST; WILL, 8.

EXAMINATION BEFORE TRIAL.

See WITNESS, 1.

EXAMINATION OF PARTY.

See DISCOVERY OF ASSETS, 3, 4.

EXECUTION.

See CONTEMPT, 2.

EXECUTION OF WILL.

1. A paper propounded as decedent's will consisted of a printed form, with decedent's signature written in a blank space in the body of the attestation clause, where it appeared that decedent had signed pursuant to the instructions of the draftsman, her physician, with the intent, understood by the witnesses, to effect a subscription of her will,—all the other statutory formalities having been observed.—*Held*, that the instrument was subscribed, substantially, at the end, and that the same should be admitted to probate. *Matter of Acker*, 19.
2. The rule that, so far as the formalities of execution are concerned, a will is sufficiently proved by proof of the due execution of a codicil unmistakably referring thereto—applied. *Matter of Nisbet*, 286.

See FOREIGN WILL, 2.

EXECUTORS AND ADMINISTRATORS.

1. An executor or administrator will not be allowed credit, upon his accounting, for money paid to satisfy a claim against decedent, which was barred by the statute of limitations at the time of the latter's death. *Shute v. Shute*, 1.
2. The responsibility of an executor for paying, without protest, a doubtful claim of the U. S. government—declared. *Matter of Peyser*, 244.
3. Under Code Civ. Pro., § 2606, as amended in 1884, the personal representative of a deceased executor or administrator, though compellable, at the instance of any person interested in the estate of the first decedent, to account for the entire administration of the latter's executor or administrator, cannot be required to deliver over trust property of the first decedent's estate, except to the court or to a newly appointed representative. *Matter of Fithian*, 305.
4. An administrator who kept \$29,000 on deposit, for a year after his administration of decedent's estate was substantially completed, was—*Held*, liable for interest thereon, at the rate of one and one half per cent., from the expiration of a year after the date of his appointment. *Matter of Mapes*, 446.
5. Executors to whom their testator has given his estate in trust to apply the income to the use of an infant daughter for life, with authority "in their discretion to apply, if necessary for her support, such part of the principal as they may think necessary," etc., will be directed by the court to make suitable payments out of the principal, where it appears that they have not honestly and in good faith exercised the power with which they were clothed. *Matter of Berry*, 458.

6. An executor or administrator cannot lawfully embark in trade the assets of his decedent's estate, though, in so doing, he believes he is acting for the best interests of the legatees or distributees, and the creditors. Contracts made by him, in such behalf, will bind him personally, but not the estate committed to his charge. *Matter of Sharp*, 416.
7. He is not, however, bound, as of course, at the death of his decedent, to make immediate conversion into money of assets of the estate which were employed in trade by the latter in his lifetime; but may, within reasonable limits, make purchases and incur liabilities, where such a course is demanded by the best interests of the estate. *Id.*
8. Testatrix, who, during several years before her death, was engaged in business on her own account, by her will, bequeathed to her executor such property as remained after payment of her debts and funeral and testamentary expenses, in trust to apply so much of the income as should be needed for the maintenance and education of her son until he arrived at the age of twenty-five years; and directed her executor to carry on some legitimate business for the benefit of such son.—*Held*, that the will did not authorize the employment of the entire *corpus* of the estate in continuing the business in which testator had been engaged, but only the residue after payment of debts and the charges mentioned, and that an application to be allowed to intervene upon the settlement of the executor's account, made by one who had recovered a judgment against the executor personally, for the value of goods purchased by the executor and consumed in continuing such business, should be denied. *Id.*

See BANK DEPOSIT ; COLLECTION OF DEBT ; DEVASTAVIT ; DISAGREEMENT OF EXECUTORS, 1, 2 ; INVESTMENTS, 2 ; RENUNCIATION, 1.

EXEMPTION.

See COLLATERAL TAX, 12 ; PAYMENT OF DEBTS, 2.

EXPENSES OF ADMINISTRATION.

An executor who employs and pays counsel for legal services in the course of his administration will not be reimbursed out of the funds of his testator's estate, unless a proper regard for the interests thereof seemed to make such services necessary at the time when they were invoked. *Matter of Peyser*, 244.

See COUNSEL FEES.

FEES.

See COSTS ; COUNSEL FEES.

FINDINGS.

A Surrogate's court will not pass upon proposed findings, in a controversy which has been before it, except upon the settlement of a case made for the purpose of an appeal from its determination. *Matter of Hoyt*, 284.

FOREIGN WILL.

1. Under Code Civ. Pro., § 2611, a testamentary paper shown to have been executed in conformity with the laws of this State is, so far as regards the formalities of execution, entitled to be admitted to probate in a Surrogate's court thereof, wheresoever and by whomsoever executed, whatever the nature of the property whose disposition it seeks to effect, and wherever such property may be situated. *Matter of McMullin*, 295.
2. Hence, where, a petition having been presented praying for probate of a will, it appeared that decedent died at Glasgow, Scotland, being a resident of that city; and was conceded that the paper was executed in Scotland while its maker resided there, that the execution was fatally defective under the laws of that country, and that there were assets in the county of New York,—*Held*, that the Surrogate's court of that county had jurisdiction to decree probate thereof. *Id.*
3. Code Civ. Pro., § 2611, as thus interpreted, is entirely consistent with *id.*, § 2694;—the object of the latter section being to designate the laws governing the validity and effect of testamentary dispositions. *Id.*

FUNERAL EXPENSES.

1. Whether an undertaker, who has furnished a funeral for a decedent's remains can, upon his own application, procure an order directing the executor or administrator to pay the reasonable expenses of such funeral—*quære*. *Matter of Hooney*, 285.
2. A widow of a decedent, who is appointed administratrix of his estate, cannot be allowed credit for payment of her husband's funeral expenses, where she has received, as "funeral expenses," from "benefit associations," more than the amount paid out by her in such behalf. *Matter of Brooks*, 326.

GENERAL GUARDIAN.

See COMMISSIONS, 2 ; MAINTENANCE.

GENERAL RULES OF PRACTICE.

See ATTORNEYS AND COUNSELLORS, 1 ; PRACTICE.

GIFT.

See DONATIO INTER VIVOS.

GUARDIAN.

See GENERAL GUARDIAN ; SPECIAL GUARDIAN ; TESTAMENTARY GUARDIAN.

HEIRS.

1. The word "heirs," when used in a will to indicate beneficiaries of a bequest of personal property, must be interpreted as equivalent to

"next of kin," in the absence of anything pointing to another interpretation as more consonant to the testator's intention. *Matter of Sinzheimer*, 321.

2. Testator, who left, him surviving, an aunt, L., his sole next of kin, by his will devised and bequeathed the residue of his estate, which consisted of personalty, with a specified exception to his "natural heirs."—*Held*, that L. was the beneficiary indicated. *Id.*

HUSBAND AND WIFE.

1. Notwithstanding the passage of the married women's acts, husband and wife remain generally, in legal contemplation, one, and can contract with one another only in matters appertaining to, and when necessary for the protection of, the separate estate of the latter. *Matter of Reuter*, 162.
2. Upon the judicial settlement of the account of the widow, and administratrix of the estate, of decedent, who was a cheesemaker by occupation, the former presented a claim for services rendered by her in working with decedent at his business, and proved a promise by him to pay her therefor.—*Held*, that the claim in question was not enforceable either at common law, or under the statutes of this State; and that the same should be disallowed. *Id.*

IMPROVIDENCE.

See LETTERS OF ADMINISTRATION, 2.

INFANT.

See SERVICE OF CITATION.

INQUEST.

See SALE OF REAL ESTATE.

INSANE DELUSION.

Decedent, who was one of the first settlers in the town of Sherman, Chautauqua county, with the aid of his twelve children by his first wife cleared up and paid for a valuable farm of 359 acres. Two years after her death in 1866, and when of the age of 71 years, he married his second wife, by whom he had no children, and to whom, by his will executed in 1876, he gave all his property. He died in 1884, aged 87 years. Soon after his marriage to his second wife, he took great apparent dislike to his children, and, during several years before making his will and until his death, he habitually, without apparent cause, denounced them as robbers and thieves, and declared that not one of them should have any of his property; at such times manifesting great excitement and refusing to be reasoned with on the subject. He was naturally of a nervous temperament, positive in his opinions and emphatic in his manner of expressing them; on other subjects than

his children, his manner and conversation were usually mild and reasonable, and in matters not relating to them he was rational and transacted business with good judgment and discretion. Upon application for probate of his will,—*Held*, that the decedent, at the time of making the same was a monomaniac, acting under the insane delusion that his children were his enemies conspiring to rob him of his property, leading him to disown them as his children, and to disinherit them from any share in his property which they had assisted him in accumulating; and, such tendency and delusion having been aggravated by the undue influence of the beneficiary, that the application should be denied. *Matter of Dorman*, 112.

INSOLVENCY.

See JOINT DEBTORS; PARTIES, 1.

INSURANCE POLICY.

See ASSETS, 2.

INTEREST.

1. An executor is liable for interest on commissions retained without judicial allowance. *Matter of Peyser*, 244.
2. The rule whereby a legacy to a testator's widow, in lieu of dower, draws interest from the death of testator will be adhered to where the legatee, being also executrix, has, for the purpose of paying the legacy, converted securities left by the testator, provided no other funds were on hand available for the purpose, and proper regard was had to the interests of those entitled to the residue. *Matter of Fogg*, 422.

See EXECUTORS AND ADMINISTRATORS, 4; LIFE TENANT, 3; PAYMENT OF LEGACY, 3.

INTERVENTION OF PARTIES.

Where a special proceeding instituted under Code Civ. Pro., §§ 2729, 2810, by an executor, trustee, for the judicial settlement of his account, has been abandoned by consent of all the parties, the same cannot be brought to a hearing, and a creditor, or person interested cannot intervene under id., § 2731. *Matter of Wood*, 345.

INVENTORY.

Code Civ. Pro., §§ 1832, 1833 and 1834, relating to the mode of impeaching or contradicting an inventory, were not intended to operate upon an accounting where a trustee's management of his trust is on trial. *Matter of Woodworth*, 156.

INVESTMENTS.

1. Testator's will gave the use of one half of his estate for life to a daughter,

remainder over; and the other half to four infant grandchildren, to be paid to them, in equal shares, as they respectively became of age. J. became of age in 1876, when an accounting was had as to his share, and he was paid the same, in full, including his share in the mortgages then outstanding. Subsequently, as each of the other grandchildren became of age, they were not, on the accountings had, paid in full; but reservations were made, of sums supposed to represent their interests in such investments, which sums varied in amount on the different accountings.—*Held*, that such sums were merely speculative, and did not determine each one's interest in what was ultimately realized. The basis for distribution, in such case—fixed. *Trust Co. v. Hall*, 73.

2. In the absence of specific and express testamentary direction, allowing a trustee to invest trust funds upon personal security, such investment is improper, and, if made at all, is at the peril of the trustee to respond in case of loss. *Matter of Cant*, 269.
3. The will of testator directed the executor to invest the funds that might come to his hands "in such suitable manner as may be for the best interests of my estate, to be determined by my said executor."—*Held*, that this language could not be construed as conferring discretionary authority to invest in unsecured promissory notes. *Id.*
4. Testamentary trustees, to whom their testator's will has given his residuary estate in trust, with power "to collect and receive the income thereof, to sell and dispose of the same, and to reinvest the proceeds of such sale in any manner that they shall deem best in order to realize a fair income therefrom, *without restriction as to the character or class of such investments*," are not thereby authorized to lend to each other assets of the estate, or invest them upon the hazardous security of a second mortgage. *Matter of Petrie*, 352.

See LIFE TENANT, 1; TESTAMENTARY TRUSTEE, 3.

ISSUE.

The word "issue," when used in a will, as designating substituted beneficiaries, with naught in the context to restrict its meaning, extends to remote descendants of the ancestors indicated, and is not confined to their children. *Matter of Cornell*, 88.

JOINT DEBTORS.

The rule, prevailing previously to the enactment of Code Civ. Pro., § 758, that, upon the death of one of two joint debtors, the decedent's estate can be held only upon showing inability to collect from the survivor, contemplates the insolvency of the latter. His discharge by virtue of the bar of the statute of limitations is insufficient. *Matter of Dunn*, 124.

JUDGMENT.

See DEATH; RES ADJUDICATA.

JUDGMENT CREDITOR.

The docketing of a judgment rendered against an executor in an action brought against the decedent in his lifetime, upon a debt of the latter, does not preclude the creditor from petitioning for a disposition of decedent's real property, under Code Civ. Pro., § 2750, which deprives "a creditor, by a judgment which is a lien upon" such property, of the right to institute a special proceeding for such a purpose. *Matter of Rosenfeld*, 251.

See COSTS, 1.

JUDICIAL SETTLEMENT.

See ACCOUNTING ; EXECUTORS AND ADMINISTRATORS ; TESTAMENTARY TRUSTEE.

JURISDICTION.

1. A petition presented to a Surrogate's court, embodying a general statement of facts, addressed to its equitable consideration, as if it were possessed of ordinary common law powers, must be denied, in view of the rule that the jurisdiction of such tribunal can be exercised only in the cases and manner prescribed by statute (Code Civ. Pro., § 2472). *Cocks v. Haviland*, 11.
2. Whether a Surrogate's court has power, after the lapse of ten years from the entry of a decree judicially settling the account of an administrator, to open the same, upon motion of one of decedent's next of kin, and amend it by adding a clause directing a co-representative, who has never rendered any account, to pay to the applicant a specified sum as his distributive share of the estate—*quære*. *Matter of Hall*, 42.
3. A Surrogate's court cannot determine the right of inheritance of heirs at law, in a contested proceeding ; nor is the division of real property or its avails within the compass of its jurisdiction, except where such property is sold pursuant to its decree under the statute. *Matter of Woodworth*, 156.
4. A Surrogate's authority to open a decree of his court depends upon Code Civ. Pro., § 2481, subd. 6, which does not include a case where such adjudication is assailed as based upon an erroneous theory of law. *Matter of Tilden*, 230.
5. A Surrogate's court has jurisdiction to take the proof of a will of a non-resident decedent, in a case where, since his death, a promissory note executed, and secured by a mortgage on land situated in another State, has come into its county and remains unadministered (Code Civ. Pro., §§ 2476, 2478). *Matter of Hopper*, 242.
6. As to whether a Surrogate's court has authority to direct an executor to expend funds of his decedent's estate, to discover facts, the disclosure whereof is necessary to enable the court to construe the will as prescribed in Code Civ. Pro., § 2624—*quære*. *Matter of Moderno*, 288.

7. A Surrogate's court is without authority to direct a temporary administrator of a decedent's estate to pay thereout any sum as costs of a special proceeding instituted to procure probate of the will. *Matter of Aaron*, 362.
8. The provisions of the Code of Civil Procedure, regulating the probate of wills in a Surrogate's court, contemplate an expansion, rather than a contraction, of the authority which such a court possessed, in this respect, under the statutes previously in force. *Matter of Delaplaine*, 398.
9. A Surrogate's court has jurisdiction to take proof of a will, not produced before it, where the original "is in another State or country, under such circumstances that it cannot be obtained" for the purpose of such production. The provision of Code Civ. Pro., § 1861, subd. 1, that a civil action may, in such a case, be maintained to establish the will, does not, by implication, oust those courts of jurisdiction affirmatively and generally conferred by *id.*, §§ 2472 and 2476. *Id.*
10. Such a court has also jurisdiction to take proof of the will of a non-resident testator, executed, without attestation of witnesses, at the place of his domicil, by the law whereof attestation was not required to validate the testamentary act. *Id.*

See ASSETS, 2 ; FOREIGN WILL, 1, 2 ; REAL PROPERTY, 2 ; SET-OFF.

LEGACY.

1. *It seems*, that a testamentary provision in favor of executors, in lieu of statutory commissions, the amount "to be divided among them from time to time," is substantially a legacy, payment whereof may be awarded in respect of transactions embraced in an account already settled by decree, and without opening the same. *Matter of Tilden*, 230.
2. It is not essential to the validity of a bequest, that a testator should use the word "give" or "bequeath," or other expression of similar significance. *Matter of Thompson*, 393.

See EXECUTORS AND ADMINISTRATORS, 5 ; VESTING, 1.

LETTERS OF ADMINISTRATION.

1. An application by a relative of a decedent, who resides within this State, for letters of administration upon the estate, must be denied if opposed by a relative, residing without the State but within the United States, who has a prior right under 2 R. S., 74, § 27, and is otherwise competent to act. *Matter of Williams*, 292.
2. One otherwise entitled to letters of administration will not be rejected under 2 R. S., 75, § 32, on the ground of improvidence, unless it is shown that he is so destitute of care and foresight in the management of property that the estate and effects of the decedent would be likely to be unsafe and liable to be lost and diminished, in case administration thereof were committed to him. *Matter of Cutting*, 456.

See ASSETS, 2 ; PUBLIC ADMINISTRATOR, 1.

LIEN.

See ATTORNEYS AND COUNSELLORS, 3, 4, 5, 6.

LIFE INSURANCE.

See PAYMENT OF LEGACY, 3.

LIFE TENANT.

1. Where trustees invested \$48,000 on mortgages which were subsequently foreclosed at an expense, for costs, taxes, etc., of \$5,680.69, and the property was bid in by them for \$32,500, and subsequently sold by them for \$50,250,—*Held*, that the difference between the last two sums was not profit, on which a life beneficiary could base a claim for income—the whole amount invested, including costs, etc., exceeding the amount realized; the result being a loss to the estate, by reason of the investment, of over \$2,000. *Trust Co. v. Hall*, 73.
2. Testator, by his will, gave “the rents, interest and entire income,” of his estate to his wife during widowhood; expressed a desire that she and their son should have a home together; and authorized and directed the executors, in case the entire income proved insufficient to the comfortable support and maintenance of his wife, or of herself and son if residing together, to pay and advance out of the principal of his estate such sums as were requisite for the purpose mentioned.—*Held*, that the ordinary rule which requires a trustee to exert himself equally for the protection of life tenant and remainderman, and to see that, at the death of the former, the latter should come into possession of all the property from which the former had derived income was inapplicable; and, the son having died, that the entire estate must be exhausted, if necessary for the comfortable support and maintenance of the widow. *Matter of Blanck*, 301.
3. Testator's will gave his entire estate to the executors in trust for the benefit of his widow for life, with remainder to his children. The executors having recovered a judgment against a debtor to the estate, upon which the latter had paid, from time to time, certain sums not in excess of the interest due thereon, without directions as to the mode of its application, the widow presented a petition praying that the amount so paid be turned over to her, as interest and income belonging to her under the will.—*Held*, that though, as between the debtor and the estate, the money in question might be deemed to have been paid as interest, and not in reduction of principal, the same must, as between the widow and the children, be regarded as *corpus* and not income, and that the prayer of the petition must be denied. *Matter of Tietjen*, 350.
4. The husband of decedent died in her lifetime leaving a will whereby he bequeathed to A. “all interest or dividends” from certain bank stock, gave to decedent “all the rest and residue” of his personal property, and appointed her and one M., its executrix and executor. Decedent took possession of the stock, and held the certificates at the time of

her death, which occurred during A.'s lifetime. An application by decedent's representatives for leave to retain the stock, subject to the claims of the life beneficiary, was opposed by M., who set forth that this property afforded the only fund for the future payment of his commissions.—*Held*, that decedent must be deemed to have held the stock in her capacity as executrix, and that the same should be surrendered to the surviving representative of her husband's estate. *Matter of Aymar*, 428

5. Testatrix, by the first clause of her will, directed that her funeral charges, expenses of administration and debts be paid out of a specified fund of \$18,000; by the second, bequeathed to her husband \$6,000, to be paid to him out of that fund; and then gave "the balance or remainder of said sum or fund of \$18,000" to her children. Upon the settlement of the executor's account, it was objected, in behalf of the children, that all the burdens had been charged upon their interest in the fund, to the exoneration of that of the decedent's husband.—*Held*, that the children were entitled only to what was left of the sum or fund in question, after satisfaction of the charges specified and the bequest to their father. *Matter of Bull*, 461.

See WILL, 3.

LUNATIC.

See ATTORNEYS AND COUNSELLORS, 2.

MAINTENANCE.

A widow, who is general guardian of the property of her son, may be allowed for past maintenance of her ward, where the latter, on attaining majority, cites her to account, with a view to payment to him of his interest in the estate of his father, of which respondent was administratrix, and the amount so allowed may be set off against that found to be due to petitioner. *Matter of Winsor*, 340.

See LIFE TENANT, 2.

MARRIAGE.

See REVOCATION OF WILL.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MARSHALLING OF ASSETS.

See PAYMENT OF DEBTS.

MENTAL CAPACITY.

See INSANE DELUSION.

MONOMANIA.

See INSANE DELUSION.

MORTALITY TABLES.

See COLLATERAL TAX, 7.

MORTGAGE.

See DONATIO INTER VIVOS, 2; INVESTMENTS, 4; TESTAMENTARY TRUSTEE, 3; WILL, 2.

MOTION.

See CONTEMPT, 2; DECREE, 2.

NON-RESIDENT.

See LETTERS OF ADMINISTRATION, 1.

NOTICE.

See PUBLIC ADMINISTRATOR, 2, 3.

OBJECTION.

The executors of testator's will having, in pursuance of a decree, paid to themselves as trustees a sum of money as a fund to produce certain annuities provided for in the will, and filed their account as such trustees, certain of the *cestuis que trustent* filed an objection insisting that the income yielded by the fund in hand was excessive, and that a portion of the principal should be restored to the residuary estate.—*Held*, that the objection, pointing out no error in the account, could not be entertained, and that the relief sought could be procured, if at all, only in an independent proceeding. *Matter of Willets*, 342.

OFFICIAL BOND.

1. A Surrogate, fixing the penalty of a bond to be exacted from the recipient of ancillary letters, under Code Civ. Pro., § 2699, may, in ascertaining the amount "which appears to be due from the decedent to residents of the State," ignore a disputed claim which is not shown to be probably enforceable. *Matter of Musgrave*, 427.
2. As to whether Code Civ. Pro., § 829, is applicable to the proofs submitted by an alleged creditor for the purpose of enabling the Surrogate to fix such penalty—*quære*. *Id.*

See TEMPORARY ADMINISTRATOR; TESTAMENTARY TRUSTEE, 1.

ONUS PROBANDI.

See VOUCHERS, 2.

PARAPHERNALIA.

Testator, by his will bequeathed to Lizzie C. Williams "all the furniture, bedding, ornaments and *paraphernalia*" of which he died possessed.—*Held*, that a watch and a few articles of clothing and jewelry, which the inventory disclosed, were the *paraphernalia*, to which the legatee was entitled. *Matter of Cooper*, 495.

PARTIES.

1. An allegation that one of two or more co-executors is insolvent, and has no assets in his hands, does not obviate the necessity of making him a party to a special proceeding instituted by a beneficiary of the will, seeking to enforce the payment of money, *e. g.*, arrears of an annuity, due to petitioner thereunder. *Cocks v. Haviland*, 11.
2. A decree, refusing probate to an alleged will, directed the temporary administrator of decedent's estate to make certain payments, as costs, out of such estate.—*Held*, that this decree made the administrator a party to the special proceeding of which it was the determination, and gave him a standing which justified a motion on his part for its modification. *Matter of Aaron*, 362.

See INTERVENTION OF PARTIES.

PAYMENT OF DEBTS.

1. Decedent, at the time of his death, was a member of a firm, which was then insolvent and indebted to L. in the amount of a promissory note, whereon the latter brought action against the administrators and, having shown the insolvency of the surviving partners, recovered a judgment in the ordinary form, with a direction added, that the same "be paid and collected out of the property of the estate of" decedent. The judgment creditor, upon the settlement of the administrators' account, claiming title to equality, in respect of payment, with the individual creditors,—*Held*, that the judgment did not purport to adjust the equities of the various creditors, but simply established the right of L. to payment out of decedent's estate; and that the individual creditors should first be satisfied, and thereafter the balance of assets be distributed among the creditors of decedent's firm, including L. *Matter of Potter*, 108.
2. Pension moneys given by the United States to a woman, on account of the military services of her son, are not, after her death, exempt, under either Code Civ. Pro., § 1393 or U. S. R. S., § 4747, in favor of her descendants not constituting a family for whom she provided, from liability to be applied to the payment of a judgment recovered, upon a debt of decedent, against her administrator. *Matter of Winans*, 138.
3. Testator, who, at the time of the execution of his will, in 1876, was indebted to A., in the sum of \$1,650, by that instrument provided that, out of the proceeds of his estate, A. was "to receive" such sum "being the amount of borrowed money due her," making reference to a

note held by A. therefor. The executor having filed his account, in 1886, for judicial settlement, A. sought to procure payment of an unpaid balance of her claim.—*Held*, that the provision, in the will, in favor of A., was a legacy in satisfaction of a debt; and that, by virtue of Code Civ. Pro., § 1819, the statute of limitations had not yet commenced to run against her demand. *Matter of Thompson*, 393.

4. *It seems*, that, even if A. were properly to be regarded as a creditor, and not a legatee, a credit given to the executor, with his assent, before the claim was barred, as for a payment on account thereof, though no money was actually paid, would, under the provisions of Code Civ. Pro., § 395, stop the running of the statute. *Id.*
5. In a special proceeding instituted, under Code Civ. Pro., § 2717, for the payment of a creditor's claim, a dispute as to whether the same has been admitted by the executor or administrator, is a dispute about its validity and legality, and necessitates a dismissal of the petition under *id.*, § 2718. *Matter of Cowdrey*, 453.

See EXECUTORS AND ADMINISTRATORS, 2; FUNERAL EXPENSES, 1.

PAYMENT OF LEGACY.

1. The will of decedent, which bequeathed a share of her residuary estate to two of the infant children of her son, provided: "And I hereby appoint my said son, S., guardian of the said estate of his said children;" and authorized S. to expend principal and income in the care, education and maintenance of the infants. Upon an application by S., to compel payment to him, by the executor, of the share bequeathed to his children,—*Held*, that the attempt to create a guardian, though abortive as such, in effect constituted petitioner a trustee of the property bequeathed, and that the same might be turned over to him, without his obtaining letters of guardianship. *Matter of Lichtenstadter*, 214.
2. Code Civ. Pro., § 2719—providing for a decree directing payment of a legacy before the expiration of a year from the issuance of letters testamentary, upon the proof of certain facts therein specified, and the filing of a bond described—has no application to the case of a legacy, or instalment thereof, which the will expressly directs to be paid within such year. But the executor may require a bond to be executed in conformity to the provisions of 2 R. S., 90, § 44. *Matter of Selling*, 225.
3. Testator, by his will, directed the executors to cause his seat in the New York Stock Exchange to be sold as soon after his decease as possible, and also to collect and receive "the amount of insurance upon my" (his) life "from that exchange, and out of the proceeds of his estate, to pay the sum of \$20,000 to C., who proved to be his sole surviving next of kin, and to whom, by the constitution of such exchange, the gratuity referred to in the clause quoted was payable. C. collected from the exchange \$10,000, on account of the gratuity, less a discount made in consideration of advanced payment. Upon the settlement of the executors' account,—*Held*, 1. That, in collecting the gratuity fund

for her own use, C. must be deemed to have received \$10,000, on account of her legacy. 2. That C. was entitled to legal interest upon the remaining \$10,000 from the expiration of one year from testator's death; and that the executors were entitled to interest on payments already made by them on account of the legacy, at the like rate from the times of the respective advances. *Matter of Noyes*, 309.

See ACCOUNTING, 1; ANSWER; PAYMENT OF DEBTS, 3.

PETITION.

See JURISDICTION, 1; PUBLIC ADMINISTRATOR, 4.

POWER OF SALE.

1. Where one who is executor of a will sells the testator's real property under a power conferred upon him by that instrument personally and not as executor, he should not include the proceeds of sale in his official account, nor are the same chargeable with executorial commissions. *Matter of Brown*, 223.
2. The will of testatrix provided: "After all my just debts and funeral expenses are paid out of my estate by my executors, I give and bequeath" certain pecuniary legacies; bestowed one half of the residue of the estate, both real and personal, upon A., absolutely, and the other half upon A. and B., "after the payments, divisions and bequests as aforesaid," in trust for a purpose stated; and empowered the executors to sell the whole or any part of the real and personal estate, ordering them to invest the proceeds, or sell any securities, as might seem most proper for carrying into effect the "provisions of this will."—*Held*, that the real property was expressly charged with the payment of debts, and subject to a valid power of sale for that purpose, and therefore could not be disposed of by virtue of a decree of the Surrogate's court (Code Civ. Pro., § 2759). *Matter of Rosenfield*, 251.

See SALE OF REAL ESTATE, 5.

PRACTICE.

A Surrogate's court has no power to disregard, relax or extend the operation of any of the General Rules of Practice. *DeLamater v. Havens*, 53.

PREFERRED CREDITOR.

Where trust moneys are deposited in a bank, and the depositor subsequently purchases property with funds drawn from that bank, the *cestui que trust*, seeking to follow the trust moneys into the property purchased, must show that, but for the intermingling of moneys in the bank, the money employed in the purchase would have been the identical trust moneys deposited. Hence, where, in a special proceeding instituted to procure the disposition of a parcel of real property of decedent, for the payment of his debts, certain incompetent infant *cestuis que trustent* sought to be paid out of the proceeds in prefer-

ence to other creditors, on the ground that their trustee had unlawfully lent funds of their trust to decedent who had purchased the property in question therewith ; and the evidence showed that, though decedent had borrowed such funds and deposited them in his bank, his account had been overdrawn thereafter and before he drew the amounts which he paid for the property,—*Held*, that the preference sought to be secured must be refused. *Matter of Youngs*, 141.

PROBATE OF WILL.

1. Where the proponent of a will, who was a beneficiary thereunder, died during the pendency of a special proceeding instituted to procure the probate thereof, leaving a will, purporting to dispose of all his property, which was thereafter proved,—*Held*, that the orderly method of continuing the probate proceeding would be an *ex parte* application by the executor of the latter will to be made a party thereto, and, upon the granting of such application, a motion on notice for a revivor in his name as proponent. *Matter of Govers*, 40.
2. As to whether probate should be accorded to a paper, propounded as a will, consisting of a printed form, with insertions in the handwriting of proponent, and presenting a blank space of one and a half pages between the last disposing clause and the commencement of a paragraph appointing executors,—*quære*. *McCord v. Lounsbury*, 68.

See COSTS, 3; JURISDICTION, 5, 8.

See WITNESS, 2.

PRODUCTION OF WILL.

See JURISDICTION, 9.

PUBLIC ADMINISTRATOR.

1. The circumstances under which the public administrator of the county of New York may obtain letters of administration of a decedent's estate are prescribed by L. 1882, ch. 410, § 227, and not by the Code of Civil Procedure. *Matter of Brewster*, 259.
2. That officer is not required to give notice of his intention to apply for such letters to a relative of the decedent who, though having a prior right to letters, is not actually entitled to a share in the estate. *Id.*
3. Failure to give proper notice of such intention is not a jurisdictional defect, but a mere irregularity, of which none can take advantage except such as are entitled to the notice. *Id.*
4. The public administrator is not required to file a petition for letters; and if he does, its allegations, though upon information and belief, are not deprived of the probative force prescribed by the statute. *Id.*
5. Money paid into the treasury of the city of New York by the public administrator, as administrator of a decedent's estate, under L. 1882, ch. 410, § 239, may be obtained by any person entitled thereto, whether in his

own right, or as an assignee, by means of a special proceeding in the Surrogate's court instituted by a petition presented under Code Civ. Pro., § 2717. *Matter of Conway*, 290.

PUBLICATION OF WILL.

Upon an application for probate, the evidence showed that the draftsman, L., after preparing the will, being requested by decedent to summon two neighbors to attest its execution, asked the latter to visit decedent, in order to witness "a paper," or "his will," it did not appear which; that they accordingly attended, and were directed by L. to affix their names to a paper and at a place indicated by him, which they did, decedent having first subscribed it, the paper being so folded, at the time, as to conceal its contents from view; that the attestation clause, appended thereto, was not read to or by the witnesses, of whom one did not remember that the character of the instrument was stated, while the other testified positively that the word "will" was not mentioned at the interview, although L. swore that he asked decedent, in the witnesses' presence, whether he wished them to witness his "last will and testament," and received an affirmative answer, which conversation, however, was not shown to have been heard by the witnesses. *Held*, that probate must be refused for want of due publication. *McCord v. Lounsbury*, 68.

PUNISHMENT FOR CONTEMPT.

See CONTEMPT.

REAL PROPERTY.

1. Proceeds of a sale of an infant's land, made in his lifetime, are real property, and descend to his heirs, where he dies intestate during minority. *Matter of Woodworth*, 156.
2. Decedent died an infant, intestate, leaving, her surviving, a mother and three sisters. During her lifetime, certain land of which she was seized was sold in proceedings instituted for that purpose, and the proceeds of sale were paid to the county treasurer. After her death, her administrator, assuming the money to be personal property, obtained an order directing it to be paid to him, included the amount in his inventory, paid the bulk thereof to decedent's mother, and, after the death of the latter, paid thereout \$50 on account of her funeral expenses. Upon the judicial settlement of the administrator's account, on objection by the surviving next of kin,—*Held*, that the money in question was real property, and retained its character as such notwithstanding the acts of the administrator in respect thereto, and that the court had no jurisdiction to determine the rights of inheritance thereof. *Id.*

See SALE OF REAL ESTATE.

INDEX.

RELEASE.

See COMMISSIONS, 9; TESTAMENTARY TRUST.

REMAINDERMAN.

See LIFE TENANT.

RENTS.

See APPORTIONMENT OF RENTS.

RENUNCIATION.

1. Under Code Civ. Pro., § 2737—enacting that where a “will provides a specific compensation to an executor, he is not entitled to any allowance for his services, unless, by a written instrument filed with the Surrogate, he renounces the specific compensation”—the time within which an executor may renounce his legacy is not limited by law. So long as he has not indicated his election between such provision and the statutory commissions, either by taking to himself one or the other, or by some other mode, his right to file a renunciation, and to avail himself of its benefits, remains unimpaired. *Matter of Weeks*, 194.
2. As to whether such a renunciation can be retracted—*quære*. *Id.*

RES ADJUDICATA.

Where the record of a judgment shows that the same could have been rendered without deciding a particular matter, afterwards brought in question between the same parties, such matter will not be considered as having been finally determined, and the judgment will not be deemed *quoad hoc res adjudicata*. *Hawley v. Singer*, 82.

RESIDUARY LEGATEE.

See WILL, 7.

RESIGNATION.

A resignation of the office of executor is not subject to retraction. *Matter of Beakes*, 128.

REVISED STATUTES.

[Sections construed or cited.]

- | | |
|----------------------------|------------------------------------|
| 1 R. S., 387, § 4..... | <i>Matter of Miller</i> , 132. |
| 1 R. S., 726, § 37..... | <i>Matter of Tilden</i> , 230. |
| 1 R. S., 730, § 63..... | <i>Matter of Hoyt</i> , 432. |
| 1 R. S., 730, § 63..... | <i>Matter of Rutherford</i> , 499. |
| 1 R. S., 773, § 1..... | <i>Matter of Russell</i> , 388. |
| 1 R. S., 773, §§ 3, 4..... | <i>Matter of Tilden</i> , 230. |

2 R. S., 64, § 43.....	<i>Matter of Gall, 374.</i>
2 R. S., 65, § 49.....	<i>Matter of Gall, 374.</i>
2 R. S., 72, § 22.....	<i>Matter of Burling, 47.</i>
2 R. S., 74, § 27.....	<i>Matter of Brewster, 259.</i>
2 R. S., 74, § 27.....	<i>Matter of Williams, 292.</i>
2 R. S., 75, § 32.....	<i>Matter of Cutting, 456.</i>
2 R. S., 84, § 13.....	<i>Matter of Battle, 447.</i>
2 R. S., 87, § 27.....	<i>Shute v. Shute, 1.</i>
2 R. S., 87, § 27.....	<i>Matter of Clark, 377.</i>
2 R. S., 90, § 44.....	<i>Matter of Selling, 225.</i>
2 R. S., 92, §§ 54, 55.....	<i>Matter of Acker, 19.</i>
2 R. S., 93, § 58.....	<i>Matter of Rowland, 216.</i>
2 R. S., 121, §§ 16, 17.....	<i>Matter of Brewster, 259.</i>
2 R. S., 150, § 1..	<i>Matter of Lichtenstadter, 214.</i>

REVIVOR.

See PROBATE OF WILLS, 1 ; STATUTE OF LIMITATIONS, 1.

REVOCATION OF LETTERS.

As to whether one named as executor, and legatee, in an alleged will of a decedent not admitted to probate, has a sufficient interest in the estate to enable him to petition, under Code Civ. Pro., § 2685, for the revocation of letters of administration issued to the public administrator—*quære. Matter of Brewster, 259.*

REVOCATION OF PROBATE.

See COSTS, 4.

REVOCATION OF WILL.

A child of a decedent, born of a marriage contracted before the execution of the will of the latter, cannot contest the admission of that instrument to probate upon the ground that he is not therein or otherwise provided for; but is confined to the remedy, afforded by Code Civ. Pro., § 1868, to recover the share of the property saved to him by 2 R. S., 65, § 49. *Contra*, where the marriage followed the testamentary act, and issue thereof, so situated, survives; in which case the will is to be deemed revoked, pursuant to 2 R. S., 64, § 43. *Matter of Gall, 374.*

SALE OF REAL ESTATE.

1. An inquest is "a trial upon the merits," within the meaning of Code Civ. Pro., § 2756, making a judgment rendered upon such a trial presump-

tive evidence of the debt, for the purposes therein specified. *Matter of Rosenfield*, 251.

2. The first sentence of Code Civ. Pro., § 2793, subd. 5,—which provides that “out of the remainder of the money” arising from a sale, etc., of a decedent’s real property for the payment of debts, etc., “must be paid the sum, if any, which has been found to be due to the executor or administrator upon a judicial settlement of his account, after applying thereupon the proceeds of the personal property,”—authorizes the payment, out of the money so realized, of a sum so found due, although it represents the costs and charges incurred and paid to claimant’s attorney during the progress of the administration. *Shute v. Shute*, 1.
3. Code Civ. Pro., § 2754, providing that the Surrogate must issue a citation, according to the prayer of a petition praying for the disposition of a decedent’s real property, where it appears that the debts or funeral expenses cannot be satisfied without resorting thereto (under id., ch. 18, tit. 5), warrants the converse conclusion that, where such satisfaction may be effected without such resort, the citation should be refused. *Matter of Davids*, 14.
4. The second sentence of the subdivision above cited, qualifying the effect of the portion quoted, is inoperative, since no sum could be “found to be due” to an executor or administrator, upon a judicial settlement of his account, except a balance of expenses of administration which the assets were insufficient to pay. *Shute v. Shute*, 1.
5. Executors having presented a petition praying for the disposition of their decedent’s real property, under the statute, it appeared that such property was devised, in trust for the benefit of decedent’s husband during life, to petitioners, whom the will clothed with authority to sell the same, upon the consent of the husband, who was willing to give it, and that there was a deficiency of assets. The property not being “expressly charged with the payment of debts or funeral expenses” (Code Civ. Pro., § 2749), it was contended that a citation should issue.—*Held*, that the executors should not proceed under the statute, but be left to exercise the power contained in the will; and that a citation might properly be refused. *Matter of Davids*, 14.
6. An order of the Supreme court, confirming the report of a referee appointed to take and state the account of the committee of the property of a lunatic, after the death of the latter, and fixing the amount of such committee’s claim, which it adjudges to be a “legal debt, claim and lien, in favor of the committee, against the estate of the lunatic, and against his legal representatives, in the same manner as if it had been a debt contracted by the lunatic in his lifetime,” is conclusive upon a Surrogate’s court, as to the character of the committee’s claim as a debt of such decedent, in a special proceeding instituted to procure the disposition of his real property for the payment of his debts. *Kowing v. Moran*, 58.
7. Upon a distribution of the proceeds of a disposition of a decedent’s real property, made as prescribed in Code Civ. Pro., ch. 18, tit. 5, “debts not

yet due" at the time of entry of the first decree are entitled, under *id.*, § 2793, subd. 7, to equality in payment with those established by and recited in such decree. *Cook v. Woodard*, 97.

8. An executor or administrator cannot be allowed, out of such proceeds, his expenses, incurred in defending an action brought against him by a creditor of the decedent, the provisions of Code Civ. Pro., § 2793, subd. 5, being only intended to cover payments made by the executor or administrator on account of debts of the decedent and funeral expenses. *Id.*

See COMMISSIONS, 4, 10 ; DISCONTINUANCE ; JUDGMENT CREDITOR ;
POWER OF SALE, 1, 2 ; REAL PROPERTY.

SAVINGS BANK.

See BANK DEPOSIT.

SERVICE OF CITATION.

A citation, to an infant under fourteen, residing in another State, should be directed to be served personally at least thirty days before the return day, or by publication. A proposal to cause the party and his guardian to be brought into this State, in order to effect a shorter service, will not be approved. *Merritt's Will*, 544.

SET-OFF.

A claim, on the part of a testamentary trustee, against a balance of income of the trust fund in his hands, arising from an alleged indebtedness, to him, of the beneficiary of such income, is a demand of set-off which cannot be adjusted in a Surrogate's court. *Matter of Rutherford*, 499.

See WILL, 11.

SPECIAL GUARDIAN.

See APPEARANCE.

SPECIFIC LEGACY.

See COMMISSIONS, 1.

STATUTE.

1. The time of the passage of an act of the legislature, approved by the executive, is the day when it receives such approval, as certified by the Secretary of State. *Matter of Chardavoyne*, 466.
2. Rights of inheritance, and of testamentary and intestate succession, being creatures of the municipal law, are entirely subject to its control and may be regulated, restricted and, it seems, even abrogated by statute. *Matter of Howard*, 483.

STATUTE OF LIMITATIONS.

1. An executor or administrator cannot, by making payments in respect of a claim the remedy upon which is barred by the statute of limitations, bind his decedent's estate, so as to revive the obligation. *Matter of Dunn*, 124.
2. Decedent died in August, 1874, and letters of administration of his estate were issued, on September 15th of that year, to M., who died September 11th, 1885, his account never having been judicially settled. In October, 1885, respondent was appointed administrator with the will of M. annexed; and on September 16th, 1886, petitioner, one of the next of kin of the first decedent, filed a petition, under Code Civ. Pro., § 2606, praying for an accounting, with a view to payment of his distributive share. Respondent answered that petitioner's claim was barred on September 15th, 1881, seven years after the issuing of letters to M.—*Held*, that, by virtue of Code Civ. Pro., § 1819, which took effect September 1st, 1880, whereby a cause of action for a distributive share is deemed to accrue when the administrator's account is judicially settled, and *id.*, § 414, making such rule applicable to special proceedings, petitioner's claim was not barred; and that respondent must account. *Matter of Van Dyke*, 331.

SEE EXECUTORS AND ADMINISTRATORS, 1; PAYMENT OF DEBTS, 4.

STAY OF PROCEEDINGS.

See APPEAL, 2.

STENOGRAPHER'S MINUTES.

Code Civ. Pro., § 2348, subd. 3., authorizing a Surrogate, in a probate proceeding, to "order a copy of the stenographer's minutes to be furnished to" an unsuccessful contestant's counsel, "and charge the expense thereof to the estate," relates exclusively to the minutes of testimony taken in the course of actual trial in the Surrogate's court, and does not extend to the case of an expenditure for a stenographic report of an examination of a witness, *de bene esse*. *Matter of Henry*, 272.

STOCK CERTIFICATE.

See LIFE TENANT, 4.

SUBSCRIBING WITNESS.

One employed and acting as the legal adviser of a testator, who becomes a subscribing witness to the latter's will, is competent, under Code Civ. Pro., § 835, to testify to facts appertaining to the question of due execution. *Matter of Elston*, 154.

SUBSTITUTION OF ATTORNEYS.

A Surrogate's court has no power to order a substitution of one attorney

for another, in respect of a party to a special proceeding, instituted therein, after the same has been removed by appeal to another court. *Matter of Hoyt*, 432.

SUCCESSION TAX.

See COLLATERAL TAX.

SURROGATE'S COURT.

See JURISDICTION.

SURVIVORSHIP.

Words of survivorship, in a will, should, if no special intent be manifested to the contrary, be referred to the date of the death of the testator. *Jennings v. Barry*, 531.

SUSPENSION OF OWNERSHIP.

1. The possibility that an event, upon which a testamentary limitation, suspending the absolute ownership of personal property, is to determine, may occur later than at the expiration of two lives in being at the death of the testator, avoids the disposition. *Matter of Russell*, 388.
2. Testator, by his will, gave the residue of his estate to his executor, in trust, to sell the same, invest the proceeds, and pay out of the income a life annuity to A. and B., respectively, and the balance to his daughter C., for life; providing that, as A. and B. should severally die, their annuities should fall into the income payable to C.; and upon C.'s death, the principal, "as the same is relieved from the payment of the life interest" mentioned, be divided among specified persons.—*Held*, that, inasmuch as, if C. survived neither or both of the annuitants, no distribution could be effected until the termination of the third life; while no intimation was given as to what portion of the principal should be "relieved" upon the death of C. and one annuitant, the scheme was wholly invalid, as being in contravention of the statute (1 R. S., 773, § 1). *Id.*

TAX.

See COLLATERAL TAX.

TEMPORARY ADMINISTRATOR.

1. The discretionary authority, conferred by Code Civ. Pro., § 2672, upon Surrogates, to permit an action to be brought against the temporary administrator of a decedent's estate, should not be exercised where the result might be the infliction of a greater injury than the claimant would suffer by reason of a refusal. Persons interested in the estate should, in general, be allowed the opportunity of resisting claims by the aid of counsel of their own choosing. *Matter of Fleming*, 336.
2. A temporary administrator appointed, under Code Civ. Pro., § 2668, subd. 1, "where delay necessarily occurs in the granting of letters testamen-

tary," etc., goes out of office, of course, upon the issuance of permanent letters, but his official bond is not *ipso facto functus officio*. *Matter of Eisner*, 383.

See DISPUTED CLAIM, 1, 2; JURISDICTION, 7.

TESTAMENTARY CAPACITY.

See INSANE DELUSION.

TESTAMENTARY GUARDIAN.

Certain decrees of a Surrogate's court, awarding commissions to one as testamentary trustee of an infant, having been set aside on appeal, upon the ground that the person receiving such award was guardian and not a trustee,—*Held*, that the court, in determining the amount of his commissions as guardian, should proceed as if he were for the first time rendering his account in that capacity. *Hawley v. Singer*, 82.

See PAYMENT OF LEGACY, 1.

TESTAMENTARY TRUST.

The beneficiary of a testamentary trust having executed an instrument acknowledging the receipt, from the trustees, of all the income of the trust fund for her benefit, accrued up to a specified date, and releasing the trustees from all liability except as respected the *corpus* of such trust fund, afterwards petitioned for an accounting and interposed an objection to the account filed, setting forth that petitioner had not received the income from the beginning of the trust up to the date in question, nor any account thereof.—*Held*, that the instrument described furnished the trustees with *prima facie* evidence of the truth of its admissions, and did not preclude petitioner from showing that the full amount of income had not in fact come to her hands. *Matter of Rutherford*, 499.

TESTAMENTARY TRUSTEE.

1. Where the circumstances of one of two testamentary trustees are such as not to afford adequate security for the proper discharge of his duties, he cannot be relieved from furnishing a bond by establishing the solvency and responsibility of his associate. *Matter of Sears*, 497.
2. A trustee who had paid moneys to the beneficiary of the income of a trust fund, at a time when no income was due, cannot be allowed to reimburse himself out of the income of the trust subsequently coming to his hands. *Matter of Rutherford*, 499.
3. One of two testamentary trustees who has assented to the act of the other in borrowing funds of the trust upon the security of a mortgage made payable with interest, at a rate greater than that subsequently established by law, until the principal indebtedness should be discharged, though liable for the principal, cannot be held for more than legal

interest, in the absence of proof of a personal benefit accruing from the transaction. *Id.*

See COMMISSIONS, 3 ; SET-OFF.

TIME.

See COLLATERAL TAX, 15.

TRIAL.

See ALLOWANCE, 1, 3 ; STENOGRAPHER'S MINUTES.

TRUST.

1. *It seems* that trust money may be followed, not only into land wrongfully purchased therewith by the trustee, but also into land purchased therewith by one to whom the trustee has wrongfully lent it. *Matter of Youngs*, 141.
2. In order to impress a trust upon land purchased by one holding money belonging to the trust, the conversion of the trust money into the property sought to be reached must be clearly shown ; it is not enough to show possession of trust funds and purchase of the property. *Id.*
3. The provisions of 1 R. S., 730, § 63, which declare the beneficial interest of a *cestui que trust* in the rents and profits of lands inalienable, are applicable to trusts for the payment of the income of personalty. *Matter of Rutherford*, 499.

UNITED STATES BONDS.

See COLLATERAL TAX, 18 ; COLLECTION OF DEBT.

UNITED STATES STATUTES.

See PAYMENT OF DEBTS, 2.

VESTING.

1. The courts favor the vesting of legacies. To postpone the vesting of a residuary estate, clear evidence of an intent to produce such a result must be presented. *Jennings v. Barry*, 531.
2. It is not a rule that, where legacies to two or more are *made payable*, by the will, at a future time, and there is a provision that, in case of the death of one legatee before his legacy is payable, the same shall go to the survivors,—the bequests are *contingent*. *Id.*

See WILL, 9, 10.

VOUCHERS.

1. Where an accounting executor or administrator holds in his possession vouchers for payments made by him, under \$20 in amount, the same should be produced and filed for the inspection of objectors. A refusal to pursue such a course upon demand would justify suspicion, and furnish the Surrogate sufficient reason for exercising the discretion

conferred by Code Civ. Pro., § 2734, in refusing credit for the items concerned. *Orser v. Orser*, 21.

2. Where an executor or administrator has lost a voucher, relating to a payment for which he asks credit upon his accounting, the burden is upon him to prove "that the charge is correct and just" (Code Civ. Pro., § 2734), as against a party objecting to its allowance. 2 R. S. 93, § 58, as amended by L. 1863, ch. 362—compared. *Matter of Rowland*, 216.

See COLLATERAL TAX, 5.

WARD.

See GENERAL GUARDIAN; SPECIAL GUARDIAN; TESTAMENTARY GUARDIAN.

WILL.

1. The residuary estate of decedent was given by his will to the executors, in trust to pay, out of the income, an annuity to his widow during her life or widowhood, and, during the same period, to distribute the excess of income, beyond the annuity, as follows: one third to his sister A., or, if she should die before the death or remarriage of the widow, to her children; one third to his sister B., with a like contingent substitution; and the remaining third "to the children of my (his) sister C., equally." One of the children of C. having died, her husband, as administrator of her estate, applied for a decree directing payment to him of his intestate's share of surplus income, which had accumulated during her lifetime and that of the widow, who was still living and unmarried. A referee, to whom the matter was referred, having found in favor of the application,—*Held*, that, unless clearly expressed or implied in the will, an intention should not be attributed to testator, that the share of the deceased child of C. should pass to her legal representative rather than to the survivors; but that the question should not be finally determined until all the children of C. had been made parties. *Matter of Marshall*, 357.
2. By one of the articles of his will, testator directed his executors, in case one T. retained, at the time of testator's death, the ownership of certain realty, to pay "the two mortgages" (describing them) "now liens upon the said house and lot, or any balance of either or both." One of the mortgages was paid by T. during testator's life time.—*Held*, that the executors were only authorized to satisfy the other. *Matter of Sinzheimer*, 321.
3. Testator's will devised and bequeathed all his real and personal estate, after payment of debts and funeral expenses, to his wife, "to have and to hold the same during the term of her natural life, subject nevertheless, to the conditions" of the will. Then followed clauses, authorizing her to sell any of the property, and purchase other property with the proceeds; to aid needy relatives; and to give of the estate for charitable and benevolent purposes; expressing testator's reliance

solely upon his wife to remember their daughter when the former should die, and desiring that such child should receive an excellent education; and finally devising and bequeathing the remainder of the real and personal estate, after the wife was done therewith, to the daughter, her heirs and assigns forever.—*Held*, as to the personalty, that the force of the clause expressly creating a limitation to the wife for life was overborne by the general scheme of the will, whereby she was clothed with an absolute and unconditional power of disposition; and that the clauses, subjecting the life estate to “conditions,” and bequeathing a remainder, were nugatory and void. *Matter of Le Fevre*, 24.

4. Testator, who died without issue, and having had seven brothers and sisters, each of whom had died before the execution of the will, leaving issue, by that instrument, after giving various general, and other legacies, directed the executors to divide the residue of his estate into equal shares, one more in number than the number of legatees mentioned in the residuary clause; five of which shares were then given to four individuals named, and “one share to each of the children, living at the time of my (his) death, of my (his) deceased” *brothers and sisters*, mentioning six of the latter successively; further providing: “But in case any one or more of the children of either or any of my deceased brothers and sisters mentioned in this clause of my will *shall die or have died* before me, leaving lawful issue surviving at the time of my death, then and in that case such issue of my deceased nephew or niece shall receive the share which his or her ancestor would have received under this clause of my will, had he or she been living at the time of my death,” with one exception. Of the brothers and sisters mentioned in the residuary clause, some children had died before, and none died after the execution of the will. It was contended that the object of the clause quoted was to substitute the grandchildren for any of the children of brothers and sisters who might die after the will was executed and before testator’s death.—*Held*, that the will manifested an intent on the part of testator that the issue of such children, of the six brothers and sisters mentioned, as were dead at the time of execution should take shares in the residue, as direct and not as substituted legatees. *Barker v. Crawford*, 61.
5. Testator died in 1875, leaving a farm worth \$8,000, incumbered by mortgages for \$4,600, and personal property consisting mostly of cattle and farming implements, worth \$2,000. A widow, and twelve children, eight of whom were minors, survived him. The will gave all the property to the widow for life, and, at her death, to the children in equal shares, except that two adult sons, who were appointed executors, were to “receive out of his estate a just and reasonable compensation for their labor and services, and for redeeming said estate from the mortgages with which it was incumbered.” The executors, upon probate of the will, took possession of the farm and property thereon, made an inventory, and, with the aid of the widow, worked the farm, keeping the family together, paid the mortgage interest and \$1,500 of the principal,

and supported and educated the minor children, until the widow's death in 1883,—without objection on the part of the other beneficiaries. The executors kept an itemized account of their receipts and disbursements during the eight years of their stewardship. Upon their accounting, four of the children contended that the executors should be paid for their services and reimbursed for their payments exclusively from the estate of the widow. Parol evidence was offered, of declarations by testator, contemporaneous with the making of the will, of a desire that the executors should adopt the course which they had pursued, and be paid and reimbursed out of his estate.—*Held*, 1. That the Surrogate had jurisdiction to construe the will, as an incident to his power to settle the estate and decree distribution. 2. That the parol evidence offered was competent to show testator's intent, upon the point at issue. 3. That the executors were entitled to payment out of testator's estate for their services and expenditures. *Matter of Thompson*, 117.

6. As to whether the other adult beneficiaries, being aware of the construction given to the will by the executors, and not objecting to their acts during the eight years of their service, were estopped from thereafter contending for a different construction—*quære*. *Id.*
7. Testator, by his will, directed that, out of the income of his estate, \$140 be annually applied to the maintenance; during life, of his daughter A., a person of unsound mind; gave the remaining income to his wife for life; and further provided that, at the death of his wife, should A. be living, all his estate except the sum set apart for the maintenance of the latter, be divided equally among his children who might then be living, etc.. A. survived her mother.—*Held*, that A. was entitled to a share of the residue distributable upon the widow's death. *Matter of Van Ness*, 464.
8. The will of the testatrix, who died September 29th, 1882, gave her whole estate to her executors in trust, to pay the entire net income thereof to her brother J., during his natural life, with remainder over. In September, 1886, J. having presented a petition to the Surrogate's court setting forth that he had received from the trustees no income since November, 1885, and praying that accrued income in their hands be paid to him, it appeared that, among the effects of testatrix had been found an instrument of "agreement," under seal, signed by J., executed shortly after the execution of a codicil to the will, reciting the foregoing testamentary provision, and containing a covenant by J. that, after he should have received such income for three years, he would execute and deliver to the executors a release and discharge thereof for any future time. There was no direct evidence that testatrix had ever avowed an intention of altering her testamentary dispositions so as to limit J.'s interest in her posthumous estate to the three years in question. J. died before the matter was determined.—*Held*, that decedent's possession of the instrument at her death was *prima facie* evidence of its delivery to her by J. in his lifetime; that, in the absence of evidence to the contrary, the agreement must be deemed to have been made in pursuance of an understanding, without which

decedent would have revoked her will, or so altered its provisions as to accomplish the result contemplated by the instrument in controversy; and that the claim of J.'s executor must be denied. *Matter of Minturn*, 508.

9. Testator's will provided : " I give to my wife \$6,000 per year, during her life, for her support. I give to each of my children not less than \$600 nor more than \$1,500 per year for their education and support until they become twenty-five years of age, as my executrix and executor may think proper. As each of my children becomes twenty-five years of age, my executrix and executor shall give each child \$50,000." It also gave the executors power to make investments and private sales. Upon an application for construction of these provisions, it was contended, *inter alia*, that the will attempted an unlawful suspension of the power of alienation.—*Held*, 1. That the provision for the widow was a simple annuity, alienable at the pleasure of the beneficiary. 2. That the first provisions for the children, whether to be regarded as strict annuities, or bequests in the nature of annuities, or as creating alienable trust interests, were valid and effectual. 3. That the legacies of \$50,000, each, to the children were not vested but contingent. 4. That there was no disposition of the residuary estate, which, accordingly, must be disposed of as in case of intestacy. *Matter of Tilford*, 524.
10. Testator, by his will, gave his estate, both real and personal, to his executors, in trust to sell and convert the same,—except his residence and furniture, of which his wife was to have the use for life,—into money, and, after paying certain general legacies, to invest the remaining proceeds for the benefit of the wife, for life, in a manner specified; further providing that, "after" the widow's death, the said premises and furniture be sold, and the proceeds, together with the principal of the fund so invested, "be equally divided and one portion thereof paid" to a son, A.; one to a daughter, B.; one to a daughter, C., for life, with remainder over; one to the children of a deceased daughter, D.; and one to a grandson, E. "In case of the death of" A., B., C. or E., "before having received the portion above devised" to them, leaving issue, him, her or them surviving, the same was to be divided "among the children of the deceased, equally"; but, "in the event" of any or either of such beneficiaries "thus dying, without leaving issue them surviving," he ordered and directed that "the portion to which he or she would have been entitled be divided equally among the survivors of them share and share alike." A., E. and B. died during the widow's lifetime, the last named without, and the others leaving, issue. The widow having died, and the entire estate being converted, the court was called upon to construe the will, in order to effect a final distribution.—*Held*, 1. That the remainders to A., B., C., E., and the children of D., were legacies, and vested at testator's death. 2. That the words of survivorship, italicized, referred to the period of distribution fixed by the will, viz.: the time of the death of the widow, and that C. accordingly took, alone, the portion which B. would have re-

ceived had she survived. 3. That the children of D. had no right as "survivors," under the clause last construed. *Jennings v. Barry*, 581.

11. Testator in his lifetime had a claim for \$2,000 against E., upon which the executors recovered a judgment against the latter, which they presented as a set-off against the share of E.'s children.—*Held*, that the set-off should be allowed. *Id.*

See EXECUTORS AND ADMINISTRATORS, 8; INSANE DELUSION; LIFE TENANT, 2, 3, 5; POWER OF SALE, 2; SUSPENSION OF OWNERSHIP.

WITNESS.

1. A party to a probate proceeding, who seeks to obtain the testimony, before trial, of an aged, sick or infirm witness, residing and being in the county where the same is pending, must proceed under Code Civ. Pro., § 2539, and cannot insist upon taking a deposition before a referee, as provided in *id.*, §§ 870-886. *Matter of McCoskry*, 256.
2. After a special proceeding for the probate of a will has been transferred to the court of Common Pleas, pursuant to Code Civ. Pro., § 2547, as amended in 1886, the Surrogate cannot be called upon, under *id.*, § 2618, to determine the question of the materiality of the testimony of a witness whom contestant desires to examine at the trial. *Matter of McGovern*, 424.
3. *It seems*, that an order is never necessary for the production of witnesses, under the section last cited. *Id.*
4. As to whether the provisions of § 2618, relating to the filing of a notice requiring the examination of witnesses to a will are applicable to the trial of probate controversies in the court of Common Pleas, *quære*. *Id.*

L. E. A. B.

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